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THE PRINCIPLES OF THE LAW OF THE SALE OF GOODS

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The Principles
of the
Law of Sale of Goods

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By

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Preface

THIS book is intended mainly for the use of business men and of students in law and in commerce in the Universities. As, however, a full citation of authorities is given, it may also be of use to the practising lawyer.

Where differences still exist between the law in Scotland and in England, the differences are noted, and, where necessary, references are made to English text-books on the subject, principally to Benjamin on Sale, the Sixth Edition.

The references embodied in the text are to the corresponding Sections of the Sale of Goods Act, 1893. That Act is referred to simply as the Act.

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Contents

CHAPTER		PAGE
	TABLE OF CASES	vii-xii
I.	GENERAL PRINCIPLES	1
II.	FORMATION OF THE CONTRACT . .	37
III.	THE PASSING OF THE PROPERTY AND RISK	48
IV.	CONDITIONS AND WARRANTIES . .	67
V.	TRANSFER OF TITLE	85
VI.	DELIVERY OF THE GOODS . . .	94
VII.	ACCEPTANCE OF THE GOODS AND PAYMENT OF THE PRICE	113
VIII.	ACTIONS FOR BREACH OF CONTRACT .	124
IX.	RIGHTS OF UNPAID SELLER AGAINST THE GOODS	142
X.	SOME SPECIAL FORMS OF CONTRACTS OF SALE—	
	CONTRACTS OF SALE F.O.B. .	159
	CONTRACTS OF SALE C.I.F. .	160
	SALES BY AUCTION . . .	166
	CONTRACTS OF HIRE PURCHASE .	171
	INDEX	175

Table of Cases

A

PAGE

Aaron's Reefs *v.* Twiss . . 17
Agra Bank, *in re*, . . . 170
Aird *v.* Pullen 116
Aitchison 168
Aitken *v.* Boullen . . . 105
Aldridge *v.* Johnson . . 59
Allen *v.* Pink 84
American, &c., Co. *v.* Boehm 164
Anderson *v.* M'Call . . . 100
Ant. Jurgens *v.* Dreyfus . . 150
Appleby *v.* Myers . . . 35
Arkwright *v.* Newbolt . . 18
Arrospe *v.* Barr . . . 24
Ashmore *v.* Cox . . . 35, 71
Attwood *v.* Emery . . . 102
Aurdal *v.* Campania, &c. . 136
Azemar *v.* Casella . . . 118

B

Badische, &c., Fabrik *v.* Basle Chemical Works . . 50, 110
Baglehole *v.* Walters . . 21
Baily *v.* De Crespigny . . 34
Baird's Trs. *v.* Baird . . 123
Barber *v.* Meyerstein . . 96
Barker *v.* Hodgson . . . 34
Baring *v.* Stanton . . . 30
Barr *v.* Gibson 45
Barr *v.* Waldie 109
Barrow, *Ex parte*, . . . 155
Barrow *v.* Arnaud . . . 126
Bell *v.* White's Trustee . . 49
Belsize Co. *v.* Cox . . . 173
Berndtson *v.* Strang . . 152
Bethell *v.* Clark. . . . 154
Bexwell *v.* Christie . . . 166
Biddell *v.* Clemens . . 161, 162
Bird *v.* Brown . . . 151, 155
Birkett *v.* Engholm . . . 164
Birrell *v.* Dryer . . . 24
Bishop *v.* Shillito . . . 96
Black *v.* Bakers of Glasgow . 147
Blackburn, &c., Co. *v.* Allen . 37

PAGE

Blacklock *v.* Kirk . . . 104
Bloxam *v.* Sanders . . . 95
Bolton *v.* L. & Y. Ry. Co. . 156
Booker *v.* Milne . . . 156
Booth Steamship Co. *v.* Cargo Fleet Co. 157
Borrowman *v.* Free . . . 138
Bostock *v.* Nicholson . . 139
Bourne *v.* Gatcliff . . . 32
Bowes *v.* Shand . . 25, 71
Bowhill *v.* Tobias . . . 159
Boyd *v.* G. & S. W. Rly. Co. 17, 19
Brewer *v.* Duncan . . . 65
Bristol, &c., Co. *v.* Fiat Motors Ltd. 78
British Columbia, &c., Co. *v.* Nettleship 131
British, &c., Co. *v.* Underground &c. Co. 136, 141
British, &c., Co. *v.* Shaw . 100
Brown *v.* M'Connell . . . 26
Bryce *v.* Ehrmann . . . 46
Buchan *v.* Melville . . . 46
Buchanan *v.* Macdonald . . 47
Buckle *v.* Knoop . . . 30
Buckman *v.* Levi . . . 111
Bunney *v.* Poyntz . . . 144
Buttery *v.* Inglis . . 43, 44

C

Cahn *v.* Pockett's, &c., Co. 62, 89, 92
Calcutta Co. *v.* De Mattos . 50
Cameron *v.* Cameron . . 134
Capital, &c., Bank *v.* Warriner 150
Carew's Estate, In *re*, . . 168
Carter & Co. *v.* Campbell . 115
Chalmers, *Ex parte*, . 95, 114, 147
Chalmers *v.* Paterson . . 114
Chanter *v.* Hopkins . . . 77
Chapman *v.* Morton . . 117
Clarke *v.* Army, &c., Society . 80
Clavering *v.* Hope . . . 24
Claddach, &c., Co. *v.* Steven . 44
Clarke *v.* Hutchins . . . 111

PAGE

Clydebank Co. *v.* Castanada . 134
Clough *v.* L. & N. W. Rly. Co. 15
Cointat *v.* Myham . . 79, 140
Cole *v.* N. W. Bank . . . 135
Commercial Bank *v.* Beal . 135
Cooper, *Ex parte*, . . 154, 155
Constantia, The, . . . 86
Cornfoot *v.* Rivett . . . 96
Cort *v.* Ambergate Co. . . 128
Cory *v.* Thames Ironworks Co. 140
Cothay *v.* Tute 111
Couston *v.* Chapman . . 169
Couturier *v.* Hastie . . . 44
Covas *v.* Bingham . . . 165
Coventry *v.* Gladston . . 155
Cowasjee *v.* Thomson . . 123
Cowdenbeath Coal Co. *v.* Clydesdale Bank . . . 153
Cramb *v.* Caledonian Rly. & Ors. 80
Cranston *v.* Mallowe. . . 54
Craven *v.* Ryder . . . 159
Crighton *v.* Stevenson . . 76
Crisdec *v.* Bolton . . . 134
Croom *v.* Stewart . . . 138
Crossley *v.* Maycock . . 8
Cumming *v.* Shand . . . 32

D

Davis *v.* Reilly 122
De Gorter *v.* Attenborough . 90
De Lassalle *v.* Guildford . . 82
Debtor *Re*, A, ... 122
Delaurier *v.* Wyllie . . . 161
Derry *v.* Peek 17
Dingwall *v.* Burnett . . 133
Distillers' Co. *v.* Dawson . 100
Dobell *v.* Neilson . . . 100
Douglas *v.* Milne . . . 84
Drummond *v.* Van Ingen 71, 73
Du Buisson *v.* Swan . . 64
Duff *v.* Iron Buildings Co. . 129
Duncan *v.* Aitchison . . 47
Duncan *v.* Schrempft . . 163
Dunford *v.* Macleod . . . 101
Dunkirk Colliery Co. *v.* Lever 126
Dunlop *v.* Crawford . . . 74
Dunlop *v.* Higgins . . . 2
Dunlop Co. *v.* New Garage Co. 135
Dunlop *v.* Selfridge . . . 46
Dunmore, Countess of, *v.* Alexander 3

E

Edgar *v.* Hector . . . 19

PAGE

Edmunds *v.* Merchants, &c., Co. 12
Ehrenbacher *v.* Kennedy . 13
Electric Construction Co. *v.* Hurry 137
Elphick *v.* Barnes . . . 54
Elphinstone *v.* Monkland Co. 135

F

Falck *v.* Williams . . . 7
Farquharson *v.* King . 56, 85, 86
Faulds *v.* Corbet . . . 166
Fleming & Co. *v.* Airdrie Iron Co. 116
Ford Car *v.* Armstrong . . 135
Ford *v.* Yates 32
Forrest *v.* Henderson . . 133
Frost *v.* Aylesbury Dairy Co. . 79
Frost *v.* Knight. . . . 128
Fuller *v.* Abrahams . . . 169

G

Gabay *v.* Lloyd . . . 27
Galton *v.* Emuss . . . 168
Gamage *v.* Charlesworth . 13, 14
Gerrard *v.* Frankel . . . 6
Gillespie *v.* Cheney . . 76, 77
Gillespie & Co. *v.* Howden & Co. 33
Gillies *v.* M'Lean . . . 24
G. W. Rly Co. *v.* Redmayne . 132
Glasgow, &c., Shipping Co. *v.* Watson 9
Glen's Trs. *v.* Lancashire, &c., Co. 7
Glyn *v.* East, &c., Docks Co. . 98
Gorrissen *v.* Perrin . . . 40
Govan Rope Co. *v.* Weir . . 107
Gowans *v.* Bowe . . . 51
Grebert *v.* Nugent . . . 132
Greenwood *v.* Sutcliffe . . . 121
Grey *v.* Butler's Wharf . . 26
Griffiths *v.* Perry . . 132, 148
Grice *v.* Richardson . . . 144
Grieve *v.* Konig . . . 101
Grissell *v.* Bristowe . . . 27
Guardians of Lichfield *v.* Green 123
Gunter *v.* Lauritzen . . . 130
Gurnet *v.* Behrend . . . 96

H

Hadley *v.* Baxendale . . 131
Hain *v.* Laing 170
Hamilton *v.* Robertson . . 74

PAGE

Hall *v.* Scott . . . 94, 122
Hardie *v.* Austin . . . 74
Harris *v.* Nickerson . . . 170
Harrison, *in re*, . . . 104
Harrison *v.* Knowles . . 83
Hartley *v.* Hymens . . . 101
Harvey *v.* Lacey . . . 4
Hayman *v.* M'Lintock . 57, 97
Hastings *v.* Pearson . . 88
Healy *v.* Howlett . . . 60
Heffer *v.* Martyn . . . 168
Heilbut *v.* Buckleton . . 82
Heiman *v.* Hardie . . . 23
Helby *v.* Matthews . . 172, 173
Henkel *v.* Pape . . . 7
Hick *v.* Raymond . . . 102
Hick *v.* Tweedy . . . 27
Higgin *v.* Pumpherston Oil Co. 109
Hill *v.* Showell 126
Hislop *v.* Shirlaw . . . 115
Hogarth *v.* Broomfield . . 49
Holliday *v.* Lockwood . . 169
Holman *v.* Peruvian Nitrate Co. 29
Hong Kong, &c., Dock Co. *v.* Netherton Co. . . . 38
Horne *v.* Midland Rly. Co. . 132
Horrock *v.* Beal . . . 36
Household Fire Ins. Co. *v.* Grant 3
Howard *v.* Castle . . . 166
Howell *v.* Coupland . . 35, 45
Humphrey *v.* Dale . . . 32
Hunt *v.* Barry 117
Hutchings *v.* Innes . . . 151
Hutchison *v.* Bowker . . 25
Hutton *v.* Warren . . . 26
Hydraulic, &c., Co. *v.* M'Haffie 102
Hyslop *v.* Shirlaw . . . 83

I

Inglis *v.* Robertson & Baxter 97
International Corporation *v.* Ferguson 85
Ireland *v.* Livingston . 161, 165
Ireland *v.* Merryton Coal Co. . 109
Isherwood *v.* Whitmore . . 114

J

Jackson *v.* Watson . . . 79
Jacobs *v.* Scott 25

PAGE

Jacobsen *v.* Underwood . . 9
Jaffe *v.* Ritchie . . 70, 72
James *v.* Griffin . . . 156
Jardine *v.* Pendreigh . . 119
Jendwine *v.* Slade . . . 83
Jenner *v.* Smith . . . 59
Johnson *v.* Nicoll . . . 81
Johnson *v.* Raylton . . . 81
Johnston *v.* Boyes . . . 170
Jones *v.* Gorton . . . 149
Jones *v.* Just 78
Jones *v.* St. John's College . 34
Josling *v.* Kingsford . . 70

K

Kain *v.* Old 83
Karberg's Case 19
Karlberg *v.* Blyth . . 163, 164
Kearney *v.* Taylor . . . 169
Kendall *v.* Marshall . . . 154
Kirchner *v.* Venus . . . 29
Kirk *v.* Gibbs 34
Kirkham *v.* Attenborough . 55

L

Laing *v.* Barclay . . 49, 64
Landauer *v.* Asser . . 65, 164
Lavaggi *v.* Pirie . . . 46
Law *v.* British, &c., Co. . . 112
Lee *v.* Butler . . . 172, 173
Leitch *v.* Edinburgh, &c., Co.. 35
Lickbarrow *v.* Mason . . 96
Linn *v.* Shields 121
London, &c., Bank *v.* Simmons 55
L. & N. W. Rly. Co. *v.* Bartlett 155
Lorymer *v.* Smith . . . 73
Lupton *v.* Schulze . . . 137

M

Mags. of Glasgow *v.* Ireland & Son 73, 117
Manbre, &c., Co. *v.* Corn, &c., Ltd. 163
Marshall *v.* Nicoll . . 126, 129
Martineau *v.* Ketching . . 65
Martindale *v.* Smith . . 121
Mason *v.* Benhar Coal Co. . 3
Macbride *v.* Hamilton . 100, 101
M'Carter *v.* Stewart . . . 116

PAGE

M'Caw *v.* Maclaren . . . 115
M'Connachie *v.* Geddes . . 42
Macdonald *v.* Henderson . 170
M'Dowall *v.* Snowball 32, 123, 161
M'Ewan *v.* Smith . . . 148
M'Grather *v.* Pitcher . . 40
M'Manus *v.* Fortescue . . 170
Malcolm *v.* Campbell . . 4
Mechan *v.* Bow . . . 117
Mechan *v.* N. E. Rly. Co. . 155
J. von Mehren & Co. *v.* Edinburgh, &c., Co. . . . 104
Menzies *v.* Menzies . 19, 20, 101
Merchant Banking Co. *v.* Phœnix, &c., Co. . . . 150
Merry *v.* Stevenson . . . 106
Mersey, &c., Co. *v.* Naylor . 107
Metropolitan Water Board *v.* Dick Kerr & Co. . . . 34
Meyer *v.* Dresser . . . 26
Miles *v.* Gorton . . . 144
Millar *v.* Bellvale Chemical Co. 129
Mirabita *v.* Imperial, &c., Bank 61
Mitchell Henry *v.* Norwich, &c., Soc. 121
Mody v. Gregson . . .71, 73
Moffat *v.* Stewart . . . 24
Mollett *v.* Robinson . . 27, 30, 31
Monforts *v.* Marsden . . 69
Moody *v.* Pall Mall Co. . . 89
Mordaunt Bros. *v.* British, &c., Mills 146
Morgan *v.* Bain . . 95, 147
Morison *v.* Lockhart. . . 52
Morrison *v.* Clarkson . . 116
Morrison *v.* Robertson . . 11
Morton *v.* Abercrombie . . 154
Muir *v.* Rankin . . 13, 155
Munro *v.* Bennett . . . 116
Murray *v.* M'Whan . . . 168
Murray *v.* Rennie . . . 9

N

N. B. Oil Co. *v.* Swann . . 104
Nelson *v.* Chalmers . . 64, 119
Newbigging *v.* Adam . . 19
Nickoll *v.* Ashton . . 35, 71
Noblett *v.* Hopkinson . . 59
Norman *v.* Ricketts . . 120
Northern, &c., Co. *v.* Bett . 112

O

Ogg *v.* Hunter 159

PAGE

Ogg *v.* Shuter 41
Oppenheimer *v.* Attenborough 90
Oppenheimer *v.* Fraser . . 89
Orient Co. *v.* Brekke . . 163

P

Paton *v.* Payne . . . 101
Parker *v.* Ibbetson . . . 32
Pirie & Co. *v.* Smith & Co. . 116
Parker *v.* Palmer . . . 117
Pasley *v.* Freeman . . . 82
Patterson *v.* Landsberg & Son. 22
Paul *v.* Corporation of Glasgow 43,77
Payzu *v.* Saunders . . . 130
Pease *v.* Gloahec . . . 15
Pearce *v.* Irons 116
Peek *v.* Gurney . . . 21
Perkins *v.* Bell 116
Pettit *v.* Mitchell . . . 26
Philips *v.* Bastolli . . . 7
Phillips *v.* Brooks . . . 12
Philp & Co. *v.* Knoblauch . 5
Pierson *v.* Balfour . . . 5
Pignataro *v.* Gilroy . . . 59
Poole *v.* Adams . . . 65
Power *v.* Barham . . . 83
Price *v.* Bank of Scotland 15, 57
Priest *v.* Last 75
Pye *v.* British, &c., Syndicate. 135

R

Ralli Brothers *v.* Campania Naviera 34
Ralli *v.* Universal, &c., Co. 65, 164
Rawlings *v.* General, &c., Co.. 168
Rayner *v.* Preston . . . 65
Reeves *v.* Barlow . . . 64
Reid *v.* Macbeth . . . 63
Richmond *v.* Railton . . 95
Risk *v.* Auld 23
Roberts *v.* Salvesen . . . 135
Robeson *v.* Waugh . . . 81
Robinson *v.* Mollett . . . 28
Rohde *v.* Thwaites . . 57, 58
Ross *v.* Plano 54
Rosevear China Co., *Ex parte*, 153
Rowan *v.* Coats. . . . 77
Ruck *v.* Hatfield . . . 159
Rushforth *v.* Hadfield . . 27

S

PAGE

Said *v.* Butt 11
Sadler's Co. *v.* Badcock . . 65
Schneider *v.* Heath . . . 21
Schotsman *v.* L. & Y. Rly. Co. 152
Scott *v.* Brown 24
Scott *v.* Steele 82
Scriven *v.* Hendley . . . 10
Seath *v.* Moore 63
Seaton, &c., Co. *v.* Mitchell . 6
Semple *v.* Wilson . . . 121
Shankland *v.* Robinson . . 20
Shaw *v.* Caledonian Rly. Co. . 23
Shaw *v.* Wadell . . . 101
Shaw *v.* Wright. . . . 121
Shepherd *v.* Kaine . . . 21
Shiell *v.* Guthrie's Trs. . . 167
Shipton, Anderson & Co. *v.* Harrison Bros. & Co. . . 34
Shipton *v.* Weil 103
Slater *v.* Hoyle 132
Smeed *v.* Foord. . . . 131
Smith *v.* Chadwick . . . 18
Smith *v.* Hughes . . . 6, 10
Smith *v.* Mercer . . . 122
Smith *v.* Wilson . . . 25
Societe Anonyme *v.* Scholefield 30
Somes *v.* British, &c., Co. . 143
Somes *v.* Jenkins . . . 29
Spencer *v.* Harding . . . 170
Stead *v.* Tattersall . . . 18
Stein *v.* County, &c., Co.. . 127
Steinberger *v.* Atkinson . 107, 147
Stewart *v.* Kennedy 19, 24, 136
Stock *v.* Inglis 60
Strachan *v.* Auld . . . 171
Strachan *v.* Marshall . . 116
Strass *v.* Spillers, &c., Ltd. . 164
Strathlorne, &c., Co. *v.* Baird . 26
Sutherland *v.* Montrose, &c., Co. 136
Sword *v.* Sinclair . . . 6

T

Taddy *v.* Sterious . . . 40
Tamplin Co. *v.* Anglo-Mexican, &c., Co. 37
Tancred, Arrol & Co. *v.* Steel Co. of Scotland 104
Taylor *v.* Bullen . . 20, 21
Taylor *v.* Caldwell . . 35, 45
Taylors *v.* Maclellans . . 102

PAGE

Taylor *v.* Wylie. . . . 172
Thomson *v.* James . . . 2
Thornett *v.* Bears . . . 79
Tigress, The, ... 151
Tod *v.* Armour 86
Tooke *v.* Hollingsworth . . 95
Turley *v.* Bates . . . 53
Turnbull *v.* M'Lean & Co. . 106
Turner *v.* Mucklow . . . 76
Turner *v.* Sampson . . . 88

U

Universal, &c., Co. *v.* Howat 23

V

Valpy *v.* Oakley . . . 132
Varley *v.* Whipp . . . 72
Veit *v.* Ireland 109
Verdun *v.* Robertson . . 7
Vic Mill Ltd., *in re* . . 126
Vigers *v.* Sanderson . . 71, 118

W

Waddington *v.* Neale . . 90
Wade *v.* Waldon . . . 101
Wallace *v.* Robinson . . . 117
Wallis *v.* Pratt . . 67, 70
Wallis *v.* Russell . 74, 79
Wallis *v.* Smith . . . 135
Wards *v.* Hobbs . . . 21
Warlow *v.* Harrison . . . 170
Watson, *Ex parte*, . . . 154
Watt *v.* Findlay . . . 96
Webster *v.* Cecil . . . 6
Webster *v.* Bosanquet . . 134
Webster & Co. *v.* Cramond Iron Co. 132
Weiner *v.* Gill . . . 55, 56
Weiner *v.* Harris . . . 88
Weir *v.* Credit, &c. . . . 163
Wertheim *v.* Chicoutimi Co. . 129
West *v.* Mair 96
West, &c., Co. *v.* Robertson . 106
West Stockton Co. *v.* Neilson . 81
White *v.* Dougherty . . 170
Whitehead *v.* Anderson . 151, 155
Whitehorn *v.* Davison . . 15
Whiteley *v.* Hilt . . . 174

	PAGE
Whittington *v.* Seale	19
Wilkie *v.* Hamilton, &c., Co.	6
Williams *v.* Agius	132
Williams *v.* Reynolds	132
Williamson *v.* Macpherson	74, 76
Wimble *v.* Rosenberg	211
Wilmshurst *v.* Bowker	62
Wilson *v.* Belgian, &c., Co.	163
Wilson *v.* Carmichael & Sons	116
Wilson *v.* Turnbull	81
Winn *v.* Bull	8
Woods *v.* Tulloch	20
Wren *v.* Holt	79
Wright *v.* Buchanan	167
Wylie *v.* M'Elroy	7, 41

The Principles
of
The Law of Sale of Goods

CHAPTER I.

General Principles.

Certain legal principles are applicable to all contracts. It will be useful to consider those which apply specially to the Contract of Sale of Goods.

Definition of contract.

When two parties have agreed to carry out a transaction on certain terms a contract is formed, neither party can go back upon the bargain, and the law in the general case will enforce it.

Offer and acceptance.

The mode in which the agreement is come to is by offer on the one hand and acceptance on the other.

When parties face to face.

When the parties are face to face little difficulty can arise in deciding whether or no an agreement has been come to. The words used by each when proved will generally be sufficient to decide the matter. If they can not be proved, as where the parties disagree as to the terms used and there is no other means of determining them, the result must be that there is no contract which the law can enforce.

Negotiations by correspondence.

When, however, the parties are in different places and the negotiations between them are contracted by correspondence, difficulties often arise as to the point of time when the bargain is completed, so that

it is no longer possible for either party to draw back. It is now quite settled that if A sends by post an offer to B, in such circumstances that in the ordinary course of business B is to answer by post, then if B puts into the post a letter accepting the offer the bargain is complete. The party accepting has done everything that he was bound to do and in the way pointed out to him by the circumstances of the case, and there is nothing more to be said. It may be that at the moment when B puts his acceptance into the post a second letter from A is on its way to him, withdrawing the offer, but B knows nothing of that and it has no effect. A retraction of an offer must reach the offeree before he posts his acceptance, otherwise the contract is completed, of course, subject to this, that he has accepted within the time allowed him to do so (*a*).

What if acceptance never reaches offerer.

This seems to be a simple rule, but if followed out logically it leads to curious results. Suppose B's acceptance is lost in the post and never reaches A, is the contract still complete, so that if A having no reply from B proceeds to sell to another party, he is liable to B for breach of contract. The Courts in England have not hesitated to come to this conclusion. An offer was made to take shares in a company under circumstances indicating that the answer was to come by post, it was accepted by letter, but the letter never reached the offerer. The first thing the offerer heard of the matter was that the Company had gone into liquidation and that he had been put on the list of contributories. It was held that he was liable as

(*a*) *Dunlop* v. *Higgins*, 1 H.L.C. 381 ; *Thomson* v. *James*, 18 D. 1.

such (*b*). Lord Bramwell dissented from this judgment holding that although the contract is completed by the posting of the acceptance this must be conditional upon the acceptance being received by the offerer in usual course, and Lord Shand in a subsequent Scottish case (*c*), in which, however, it was unnecessary to decide the point, intimated his concurrence with this opinion. It must, therefore, be taken that the point is still open in Scotland. To protect himself from any such consequences the offerer may stipulate in his offer that it is to be held as withdrawn unless he *receives* an acceptance by a certain date.

Retractation of acceptance.

A further question arises in this connection. Can the offeree retract his acceptance after he has posted it by a letter or telegram which reaches the offerer before or at the same time as the acceptance? If the rule that the posting of the acceptance completes the contract is fully carried out, it would appear that he cannot, and opinions have been expressed in England to this effect, but no decision has yet been pronounced. It is thought that in Scotland, at all events, it would not be so held. It seems repugnant to common sense (*d*).

Withdrawal of offer.

Unless and until an offer is accepted there is no contract, and if there is nothing in the terms of the offer to the contrary the offer may be withdrawn at any time before it is accepted, subject to what has been already said. But by the terms of the offer the offerer may bind himself to keep it open for a certain period. Such an undertaking is binding according to

(*b*) *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216.
(*c*) *Mason* v. *Benhar Coal Co.*, 9 R. at p. 890.
(*d*) See *Countess of Dunmore* v. *Alexander*, 9 S. 190.

the law of Scotland, and an acceptance within the period will complete the contract. In England it is otherwise, and the offerer can withdraw the offer at any time in spite of such undertaking unless some consideration has been given to the offerer for it.

Invitation to make an offer.

Questions frequently arise as to the exact nature of a communication sent by one business man to another. Is it an offer which requires only an acceptance to complete a contract—or is it merely an invitation to the other party to make an offer which may or may not be accepted? A telegram was sent to the owner of a property in the following words, "Will you sell us (the property); Telegraph lowest cash price." The owner replied, "Lowest price, £900." The applicants replied, "We agree to buy (the property) for the sum of £900 asked by you." It was held that there was no concluded contract. The first telegram asked two questions. The second answered only the second question. It did not contain an offer to sell at the price named. The applicants contended that an answer in the affirmative to the first question was implied, but the Court held that there was nothing to support that contention (*e*).

In all such cases it is a question of construction of the documents and the intention of the parties. If all the terms which require to be adjusted in order to make a complete contract are clearly stated in the first letter, and this letter appears to be a firm offer to contract on these terms, obviously all that is required is an unconditional acceptance of these terms

(*e*) *Harvey* v. *Facey*, 1893, A.C. 552; *Malcolm* v. *Campbell*, 19 R. 278.

by the second party (*f*). And the same may be true although all the necessary terms are not expressly set out in the first letter, if those which are amissing be supplied by the custom of trade, that is to say, are always understood to be agreed to in a certain way if nothing be said to the contrary. Thus recognised and uniform contracts have been drawn up in certain trades which are held to apply to every contract unless the contrary is stated. If, however, the first letter even when so supplemented fails to state or imply all the terms necessary for a complete contract, an acceptance of the terms which it does state cannot make a contract.

Traders often circulate price lists of goods dealt in by them. This does not amount to an offer by them to sell at those prices to the effect that a mere acceptance will conclude a contract. It amounts to no more than an invitation to others to make an offer to buy at these prices. But where an order is received by a trader which is in the ordinary line of his business it must be immediately refused if that is his intention, otherwise the trader will be held to have accepted it (*g*).

Errors in offer.

Cases occur where the offerer, either through an error in his private calculations, or through a slip of the pen, makes an offer which he does not mean. The question then arises can the other party by accepting such an offer make a binding contract. There appears to be a distinction to be observed in such cases.

If the other party must have known from the first

(*f*) *Philp & Co.* v. *Knoblauch*, 1907, S.C. 994.
(*g*) *Bell's Prin.*, § 80 ; *Pierson* v. *Balfour*, Dec. 1, 1812, F.C.

that the offer was made in mistaken terms then he cannot snap at the offer as it has been said and hold the offerer bound by it. So where an offer to buy at £2000 was refused and in the same letter a counter offer was made to sell at £1200, the intention obviously being to make a counter offer to sell at £2100 it was held that acceptance of such a counter offer did not make a contract (*h*).

If, however, the other party did not know, and had no means of knowing, that there was any such mistake in the making of the offer, other considerations come in. It is a general principle in mercantile contracts that every man is entitled to believe and to act on the belief that others mean what they say, and the latter will not be heard to say that they meant something else (*i*). So where an offer was made to execute certain work for a lump sum the offerer was held not entitled to plead that in his private calculations he had omitted certain items included in the work, and he was held bound by the acceptance of his offer as made (*j*). This case was approved in a later case (*k*). In an old case, however (*l*), where a quantity of tea was sold at 2s. 8d. a pound, and the seller intended the figure to be 3s 8d, a different result followed and the seller was held not bound by his offer. But the grounds of the decision are not given and it may be that the case was held to fall under the first class of cases above referred to and that the buyer must have known from

(*h*) *Webster* v. *Cecil*, 30 Beav 62; *Gerrard* v. *Frankel*, 30 Beav 445.
(*i*) *Smith* v. *Hughes*, L.R. 6 Q.B. at p. 607.
(*j*) *Seaton Brick & Tile Co.* v. *Mitchell*, 2 F. 550.
(*k*) *Wilkie* v. *Hamilton Lodging House Co.*, 4 F. 951.
(*l*) *Sword* v. *Sinclair*, M. 14241.

the lowness of the price quoted that the offerer had made some mistake.

Offer by telegraph

When the negotiations are by telegraph mistakes may easily occur, the offer as delivered to the other party differing from that handed in to the office. In such a case the sender is held not responsible for the mistake, and if the other party accepts the offer as delivered to him the sender is not bound. There is no contract (*m*).

In code.

When the telegrams are in code difficulties may arise as to the construction or meaning of the message. If the message on being decoded is ambiguous and the parties, in fact, put different constructions upon it, there is again no contract (*n*).

Where there is an obvious error in a written contract, grammatical or otherwise, which makes the contract read as nonsense, the Court will correct it so as to give effect to the obvious meaning of the parties (*o*). In a verbal contract an error in an offer made by a mere slip of the tongue is not binding (*p*).

Acceptance of offer.

When an offer is accepted the contract is complete. But the acceptance must precisely meet the offer. If it differs it is not an acceptance at all and cannot be founded on as such to any effect (*q*). It also amounts to a rejection of the offer which has been made, so that such offer cannot thereafter be accepted in its terms so as to bind the offerer.

Agreement to be put into formal shape

In cases where the accepter stipulates that the

(*m*) *Verdin* v. *Robertson*, 10 M. 35; *Henkel* v. *Pape*, L.R. 6 Ex. 7.
(*n*) *Falck* v. *Williams*, 1900, A.C. 176.
(*o*) *Glen's Trs.* v. *Lancashire Ins. Co.*, 8 F. 915.
(*p*) *Philips* v. *Bistolli*, 2 B. & C. 511.
(*q*) *Wylie & Lochhead* v. *M'Elroy & Sons*, 1 R. 41.

agreement shall be thereafter put into a formal shape, questions often arise whether there is at once a binding contract or whether this is suspended until the formal contract is signed. If there is a simple acceptance of an offer to purchase accompanied by a statement that the accepter desires that the arrangement should be put into some more formal shape, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, then until these conditions are accepted there is no final agreement such as the Court will enforce (*r*). It comes, therefore, to this that where you have a proposal or agreement expressed to be subject to a formal contract being prepared it means what it says, it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction whether the parties intended that the terms agreed on should merely be put in form or whether they should be subject to a new agreement, the terms of which are not expressed in detail (*s*).

Acceptance must be timeous.

Acceptance must be within the time limited by the offer, or, if no time be stated, then within a reasonable time. On 2nd March an offer was made to buy goods, the offer bearing, "This for reply by Monday, 6th inst." The offer was accepted by letter posted on the evening of 6th March, which reached the offerer on

(*r*) *Per* Jessel M.R. in *Crossley* v. *Maycock*, L.R. 18 Eq. at p. 181;
(*s*) *Winn* v. *Bull*, 7 Ch. D. 29.

the following day. It was held that the acceptance was in time (*t*). As to reasonable time it is obvious that in dealing with commodities, which fluctuate rapidly in value, the acceptance must be as prompt as possible and probably return of post will be the limit unless there be some reason which requires a longer time. In any case the lapse of the time allowed puts an end to the right to accept and this will not be extended by a mere continuation of negotiations without an express agreement to extend the time (*u*)

Death, &c., of offerer before acceptance.

The death, insanity, or bankruptcy of the offerer occurring before the offer is accepted will operate as a withdrawal of the offer. It is impossible to transact in any such case.

Assent to contract apparent but not real.

We have seen that a contract is formed by the assent of the parties to its terms. It follows that although assent may have apparently been given if in reality there has been no assent there can be no contract.

Mistake.

This state of matters may arise where there has been error or mistake as to an essential part of the contract. The parties may not really be at one. One party may be agreeing to one thing while the other party is agreeing to another.

Thus there may be a mistake as to the thing sold In a sale by auction of a number of bales of hemp and also of a number of bales of tow, which is much less valuable, a bale of tow was knocked down to a

(*t*) *Jacobsen* v. *Underwood*, 21 R. 654; *Murray* v. *Rennie*, 24 R. 965.

(*u*) *Glasgow &c. Shipping Co.* v. *Watson*, 1 R. 189; *Wyllie* v. *M'Ilroy*, 1 R. 41.

bidder who thought that he was bidding for a bale of hemp. It was held that there was no contract (*v*).

Mistake must be essential.

A mistake of this kind must go to the root of the contract. Mistakes not of this nature will have no effect. For example, in most sales both the seller and the buyer form in their own minds pretty definite opinions as to what the goods are really worth. These opinions may differ widely, and if so one of them at least must be wrong. The seller may sell the goods too cheap or the buyer may buy too dear, but this has no effect upon the contract. Each has bought and sold the very thing intended.

And further, one of the parties may be aware that the other is labouring under a mistake as to the value of the goods. If he has done nothing to induce that mistake he is not bound in law to correct it. The parties are at arms length. If each party were bound to disclose to the other every fact bearing upon the transaction which is within his knowledge, business could hardly be carried on (*w*).

Mistake as to identity the party of dealt with.

A mistake as to the identity of the person with whom the contract is made may void the contract in cases where the identity of the person is material. In a sale for cash this can seldom be so. If the seller gets his money he is generally indifferent as to who the buyer may be. But if the sale be on credit the buyer's identity is obviously material. And it may be so in other cases, as where the buyer buys simply because he has a set off against the man from

(*v*) *Scriven* v. *Hendley*, 1913, 3 K.B. 564.
(*w*) *Smith* v. *Hughes*, L.R. 6 Q.B. 597.

whom he thinks he is buying, or, where the seller has reasons for not desiring to deal with a certain person, and that person employs another to obtain a contract for him as his agent without disclosing the agency (*x*).

An instance of a mistake as to identity occurred where a man at a fair fraudulently represented to a farmer who had cattle for sale that he was the son of a person to whom the farmer had often sold on credit terms, and that he was instructed to buy for his alleged father. The farmer believing these representations sold and delivered the cattle to him on credit. The man immediately resold the cattle to a third person for cash, delivered the cattle and disappeared, the person who bought the cattle being entirely ignorant of the fraud. When the fraud was discovered the farmer claimed the cattle from the purchaser and was held entitled to them without payment on the ground that the first sale was void owing to the mistake in the identity of the buyer (*y*).

Mistake renders the contract void.

The effect of all such mistakes as we are now considering is that the contract is void from the beginning. In fact it is more correct to say that there never was a contract. There never existed such assent of the parties as is necessary to form a contract. The consequence in the case just cited was that the swindler never got any title to the cattle any more than a thief would have had, and he could, therefore, transfer no title to the buyer from him, who was obliged, therefore, to give them up to the true owner. It will be

(*x*) *Said* v. *Butt*, 1920, 3 K.B. 497.
(*y*) *Morrison* v. *Robertson*, 1908 S.C. 332.

observed, of course, that there was gross fraud in the transaction, and the farmer could have cut it down on that ground. But as will appear presently this would not have entitled him to recover the goods from a party who had bought from the swindler in ignorance of the fraud.

It has been decided in England, contrary to the above decision, that where a sale is made to one who is personally present, a mistake as to the identity of the buyer on the part of the seller brought about by the fraud of the buyer will not make the contract void, but only voidable. The buyer will, therefore, be able to give a good title to the goods to a third party acting *bona fide* and without notice, and who has given value for the goods before the seller has taken steps to disaffirm the contract (*z*). This case was decided following an American case (*a*), but it seems to deserve reconsideration.

Fraud.

Another class of cases where although assent may apparently have been given there has in reality been no assent, is where the assent has been obtained by means of fraud.

It is neither possible nor desirable to give an exhaustive definition of fraud. It is sufficient to describe it as any machination or contrivance to deceive (*b*), and it may be practised either on the seller or the buyer.

Fraud on the seller.

Fraud may be employed by the buyer to induce the seller to contract with him and to give a consent

(*z*) *Phillips* v. *Brooks*, 1919, 2 K.B. 243.
(*a*) *Edmunds* v. *Merchants &c. Co.*, 135 Mass. 283. See *Benjamin*, p. 115 *et seq.*
(*b*) Bell's *Prin.*, § 13.

which would not otherwise have been given. The question in such cases seems practically to come to this: Whether the goods have been obtained on false pretences (*c*).

Where buyer intends not to pay.

To buy goods with the intention of not paying for them is a fraud going to the foundation of the contract, and if this be shown the seller in any question with the buyer or his creditors is entitled to reduce the contract and reclaim the goods (*d*). But it lies upon the seller to show that this fraudulent intention was in the buyer's mind when he bought the goods. The mere fact that the buyer's books show that he was insolvent at that date will not be enough. A man is entitled to go on trading right up to the date of his sequestration, and it would be very unwise to interfere with that right. Many merchants experience periods when they would be unable if called on to pay all their creditors in full, but they continue to trade in the usual way and frequently succeed in retrieving their affairs (*e*). But wherever the merchant's dealings appear to have for their object not his fair restoration to solvency but the preference of some favourite creditors at the expense of a stranger, or his own emolument or the advancement of some secret and selfish scheme which is not for the general behoof, these circumstances joined with insolvency and quickly followed by bankruptcy have been held to indicate fraud sufficient to annul the bargain (*f*). And, of course, other circumstances such as paying the price of the

Where buyer insolvent the purchase not necessarily fraudulent.

(*c*) Bell's *Com.* I., 263.
(*d*) *Gamage* v. *Charlesworth*, 1910, S.C. 257.
(*e*) *Ehrenbacher* v. *Kennedy*, 1 R. 1131.
(*f*) Bell's *Com.* I., 267; *Muir* v. *Rankin*, 13 S.L.T. 60.

goods bought with a cheque which the buyer knows will not be honoured, and the like, may be sufficient to establish the fact of the buyer's fraudulent intention.

Fraudulent representations by buyer.

If this can be established it is unnecessary to go further and inquire into any particular statements and representations which may have been made by the buyer to the seller, because his conduct in buying is itself a representation that he intends to pay. And it must always be presumed that the seller parts with his goods only in the expectation of being paid for them (*g*). But the seller frequently grounds his case not on the fraudulent intention of the buyer but on fraudulent statements and representations made to him by the buyer to induce him to enter into the contract. The seller has then to show that such fraudulent statements were made, and further, that these statements were the cause of the contract. We shall consider this case more fully in connection with the subject of fraud on the buyer, where the principle is the same (*h*).

What sellers must prove.

We have seen that the mere knowledge of the buyer that the seller is under a misapprehension as to the value of the goods does not put upon the buyer the duty to remove that misapprehension. But if the buyer says or does anything to produce that misapprehension that is fraud, and the seller will be entitled to rescind the contract.

Fraud makes the contract voidable not void.

The effect of fraud such as we have been considering is not to make the contract void *ab initio*, it only makes

(*g*) *Per* Lord Kinnear in *Gamage* v. *Charlesworth*, 1910, S.C. at p. 264.

(*h*) See p. 17.

it voidable in the option of the seller. The property vests in the buyer until the seller has done some act to disaffirm the transaction, and the legal consequence is that if before the disaffirmance the fraudulent buyer has transferred either the whole or a partial interest in the goods to an innocent transferee, the title of such transferee is good against the seller (§ 23) (*i*).

In seeking to avoid the contract and to recover the goods from a party to whom the buyer has sold or pledged them the burden lies on the seller to prove that the party received the goods with notice of the fraud or otherwise than in good faith (*j*).

How may seller rescind the contract.

But the question arises how may the seller effectually declare his option to rescind the contract to the effct of preventing a third party in good faith obtaining a good title to the goods. It has been said (*k*) that it is not necessary that there should be a judgment of Court in order to effect the avoidance of a contract when the deceived party repudiates it. The rescission is the legal consequence of his election to reject it and takes date from the time at which he announces his election to the opposite party. But the earlier Scottish authorities seem to indicate that an action for reduction and restitution is necessary for this purpose (*l*) and this seems more in accordance with the principles of the Sale of Goods Act and of the Factor's

(*i*) *Pease* v. *Gloahec*, L.R. 1 P.C. 219; *Clough* v. *L. & N. W. Rly. Co.*, L.R. 7 Ex. 26; *Price* v. *Bank of Scotland*, 1910, S.C. 1095.
(*j*) *Whitehorn* v. *Davison*, 1911, 1 K.B. 463.
(*k*) Benjamin, p. 524; *Price* v. *Bank of Scotland*, 1910, S.C. *per* Lord Kinnear at p. 1107.
(*l*) Bell's *Com.* I., 261; M. P. Brown on *Sale*, 416.

Act. The fraudulent buyer has possession of the goods, and if the *bona fide* third party has no notice of the rescission of the contract why should his title be affected by such rescission ?

Fraud on the buyer.

Fraud on the buyer may take one of very many forms. The most common is that of fraudulent misrepresentations.

Fraudulent misrepresentation.

A false representation is fraudulent when it has been made (1) knowingly, (2) without belief in its truth, or, (3) recklessly, careless whether it be true or false. The third head is but an instance of the second because one who makes a statement under such circumstances can have no real belief in the truth of what he states. But a false statement made in the honest belief that it is true is not fraudulent. So a false statement made through want of care or on insufficient grounds is not on that ground only fraudulent. But when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground on which an alleged belief was founded is a most important test of its reality. In many cases the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court, that it was not really entertained and that the representation was a fraudulent one. So too although means of knowledge are a very different thing from knowledge, if it appears that a person making a false statement had shut his eyes to the facts or purposely abstained from enquiring into them, it would be held

that honest belief was absent and that he was just as fraudulent as if he had knowingly stated that which was false (*m*).

It must be kept in view as we shall consider elsewhere that mere boastful statements made by a seller as to the quality of his goods are not to be taken seriously. Although they may be false they are not considered fraudulent in the sense we are considering.

If a fraudulent misrepresentation is made by the seller he will not be heard to say that the buyer might on enquiry have discovered its falsity. That has been called an audacious plea (*n*).

Buyer must show that he was in fact influenced by the misrepresentations.

In order that a buyer may found upon a fraudulent misrepresentation he must show that he was, in fact, induced by it to enter into the contract and that he has thereby suffered damage. If he knew that the representation was false and still decided to buy, or, if the false representation did not in any way influence him in buying, he cannot found upon it. If, however, the false representation was *one of* the inducing causes of his buying that will be sufficient.

The most satisfactory proof of this point is to show that the statement was one which was obviously material, and one which would naturally influence the mind of a buyer, and that in point of fact it did so influence his mind. Proof on the latter point was strongly insisted on by Lord Kinnear in the case of Gamage, cited above (*o*). But it is a question of fact, and may be inferred as such in certain circumstances

(*m*) *Derry* v. *Peck*, 14 A.C. *per* Lord Herschell at p. 374 *et seqq.*; *Boyd* v. *G. & S. W. Rly Co.*, 1912, S.C. (H.L.) 93.

(*n*) *Aaron's Reef* v. *Twiss*, 1896, A.C. 273.

(*o*) See p. 14.

as where the statement must have been the inducing cause of the transaction there being no others apparent, in the case (*p*). It can never be safe, however, to omit the direct evidence of the buyer himself. Still more is this necessary when the statement is ambiguous, being in one sense false, in another sense true. The buyer must show that he understood it in the sense that was false.

Remedies of the buyer.

The remedies open to a buyer who has been induced by fraud to enter into the contract are alternative in his option.

Rescission on restitution of the goods.

He may rescind the contract and recover back from the seller any money he may have paid to him under it, that is to say, if he can restore the goods which he has received in the same state in which he received them. But this proviso is construed reasonably. If he has done nothing to the goods beyond what he was entitled to do, for example, in testing their quality, or, if any change which has occurred, in the condition of the goods has arisen from a cause for which he is not to blame, as where a horse has died while in the possession of the buyer without his fault, his right to rescind the contract will not be prejudiced (*q*).

Damages.

And if he has suffered loss naturally resulting in the ordinary course of events from the seller having failed to supply the goods, conform to the representations made then in addition to rescinding the contract, the buyer may recover such loss from the seller.

Alternatively the buyer may retain the goods and claim damages.

Instead of rescinding the contract the buyer may

(*p*) *Smith* v. *Chadwick*, 9 A.C. at p. 196; *Arkwright* v. *Newbold*, 17 Ch. D. at p. 324.

(*q*) *Stead* v. *Tattersall*, L.R. 7 Ex. 7.

keep the goods and recover from the seller the loss sustained by him through the misrepresentation, that is to say the difference between the actual value of the goods and the value they would have had if the representations had been true. If, for any reason, the buyer is unable to restore the goods to the seller, this will be his only remedy.

Innocent misrepresentations.

If a misrepresentation be not fraudulent in the sense explained above, that is to say, if it be made with an honest belief in its truth, then it is held to be an innocent misrepresentation the effect of which has now to be considered.

Buyer may rescind contract on restoring the goods.

If any innocent representation made by the seller in the course of negotiation and with reference to the subject matter of the contract, induce essential error in the mind of the buyer, the buyer may rescind the contract, provided that he makes his challenge immediately he discovers the misrepresentation, and provided also that he is able to restore the goods to the seller in the condition in which he received them (*r*). The buyer will be entitled to recover any money he has paid with interest (*s*), and to be indemnified from all obligations and consequences resulting from the contract (*t*), but he is not entitled to retain the goods and claim damages. If he cannot restore the goods he has no remedy (*u*).

Error is held to be essential when it is shown that

(*r*) *Stewart* v. *Kennedy*, 17 R. (H.L.) 25, 1890, A.C. 108; *Menzies* v. *Menzies*, 20 R. (H.L.) at p. 142; *Edgar* v. *Hector*, 1912, S.C. 348.

(*s*) *Karberg's Case*, 1892, 3 Ch. 1.

(*t*) *Newbigging* v. *Adam*, 34 Ch. D. 582; *Whittington* v. *Seale*, 82 L.T. 49.

(*u*) *Boyd* v. *G. & S. W. Rly. Co.*, 1915, S.C. (H.L.) 20; 1915, A.C. 526.

but for it one of the parties would have declined to contract (*v*).

Failure to disclose facts.

Essential error on the part of the buyer may be caused by the failure of the seller to disclose facts which in the circumstances he was bound to disclose. The failure to disclose may be quite innocent, but the effect will be the same as if an innocent misrepresentation had been made. Such a case may arise where the seller having made a representation which he believed to be true afterwards discovers that it is untrue or doubtful and fails to disclose this new information to the buyer (*w*).

A representation may be a warranty.

But it must be kept in view that a representation may amount to an express warranty (*x*). In that case it becomes a material part of the contract and must be fulfilled whether it be made fraudulently or innocently. If it is not fulfilled the buyer may either rescind the contract or he may retain the goods and claim damages (*y*).

Fraud may enter into a contract in many other ways besides false representations.

Concealing defects.

So when the seller uses devices to conceal defects in the article sold, or, induces the buyer to omit an examination which would reveal the defects, the result is the same as where false representations are made.

Sales "with all faults."

If the terms of the sale be that the goods are to be taken "with all faults," the seller has no liability

(*v*) *Menzies* v. *Menzies*, 20 R. (H.L.) at p. 142 ; *Woods* v. *Tulloch*, 20 R. 477.

(*w*) *Shankland* v. *Robinson*, 1919, S.C. 715 ; 1920, S.C. (H.L.) 103 ; *Taylor* v. *Bullen*, 5 Ex. 779.

(*x*) See p. 81. (*y*) See p. 128.

in respect of any defect in the goods themselves, provided he does nothing to conceal such defects. But if the seller goes on to say that he believes that the goods are free from any particular fault, when, in fact, he knows that they are not, then this is fraud (*z*). It is a misrepresentation of a fact, namely, of what he believes.

But even under a sale "with all faults," the goods must correspond with their description in the contract, otherwise there is a breach of an implied condition of the sale (§ 13). If owing to a latent defect the goods do not correspond to the description given of them in a commercial sense the sale will not stand (*a*) If, however, the terms of the sale are "with all faults and without any allowances for any defect *or error* whatever," the seller will be protected from any innocent misrepresentation in the description of the goods (*b*).

Half-truths.

A half-truth may be equivalent to a falsehood. When what is divulged conveys a meaning which would at once be seen to be untrue if the whole truth were known, the suppression of the whole truth is a fraud (*c*).

There may be fraud although no representation is made.

Fraud may exist although the seller never makes any verbal representation at all in reference to the article sold. If he offers for sale articles which by their appearance suggest that they are of a certain kind, *e.g.* antiques, when he knows that they are not,

(*z*) *Ward* v. *Hobbs*, 4 A.C. 13; *Schneider* v. *Heath*, 3 Camp. 506; *Baglehole* v. *Walters*, 3 Camp. 154.
(*a*) *Shepherd* v. *Kaine*, 5 B. and Ad. 240.
(*b*) *Taylor* v. *Bullen*, 5 Ex. 779.
(*c*) *Peck* v. *Gurney*, L.R. 6 H.L. 377.

but have been recently manufactured in imitation of antiques, he is not entitled to keep silence and allow the buyer to be deceived by the appearance of the things themselves (*d*).

Force and fear.

A third class of cases where the assent given to a contract is only apparent and not real is where the contract is entered into by one of the parties in consequence of force or fear employed by the other to compel him to do so. In such cases the contract is void *ab initio*, but as they can rarely occur now they need not detain us.

Contracts not enforceable.

It has been said above that when a contract has been entered into the law will in the general case enforce it. But there are contracts which the law will not enforce. These are contracts which are held to be immoral, or, which are illegal either by statute or at common law. The only class of such contracts which need be considered here are wagering contracts.

Wagering contracts.

Such contracts are declared to be null and void in England by the Statute 8 and 9, Vict. c. 109, § 18. That Act does not apply to Scotland, but the same result is arrived at by the Scottish rule that such contracts will not be enforced by the Courts on the ground that Courts of Justice were instituted to enforce the rights of parties arising from serious transactions which such contracts are held not to be.

The test of whether a contract of sale falls under this head or not is to decide whether on the one hand the intention of the parties was really to sell and deliver the goods or whether on the other hand the

(*d*) *Patterson* v. *Landsberg & Son*, 5 F. *per* Lord Kyllachy at p. 681.

intention was under guise of such a contract merely to speculate in the rise or fall of prices and the goods are not to be delivered, but one party was to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract. In the latter case the contract is a wagering contract (*e*).

The question is a question of fact, and it is for the party seeking to avoid the contract to show that it was a wagering contract in the above sense. And he must show there was an *agreement* of parties that there should be a payment of differences and nothing else. If he cannot show any such agreement, and if under the contract the buyer or seller can demand actual delivery of the goods, or the price, it is impossible to hold that there was not a real transaction. There may have been good grounds for believing that actual performance of the contract would not be demanded, but in the absence of proof of any agreement to this effect that will not be sufficient (*f*).

Contract "to make a market" illegal.

It is illegal for two or more persons to "make a market" in shares by agreement to purchase them so as to induce would-be buyers to believe contrary to the fact that there is a *bona fide* market for the shares and that they are at a real premium. Such an agreement cannot be enforced by one of the parties against another, and any money paid under it cannot be recovered back. The Court will take judicial

(*e*) Benjamin, p. 614.

(*f*) *Risk* v. *Auld*, 8 R. 729; *Heiman* v. *Hardie & Co.*, 12 R. 406; *Shaw* v. *Caledonian Rly. Co.*, 17 R. 466; *Universal &c. Co.* v. *Howat*, 19 R. 128.

notice of such an agreement even where the illegality is not pleaded (*g*).

Rights of brokers carrying out such contracts.

If a broker is employed to make contracts for a client which are gambling contracts in respect that they are merely contracts for differences, he is entitled to recover from his client disbursements made by him in carrying out the contracts if he can show that he actually became liable to make such disbursements (*h*).

Ambiguities in contracts.

A large proportion of the disputes which occur in business arise from ambiguities in contracts. These are caused by the looseness of the language often employed, and sometimes by the use of technical and elliptical expressions which convey no meaning at all to unskilled persons, and further are found after the dispute has arisen to be understood in different senses by different business men (*i*). In such cases the dispute arises in the working out of the contract, and the Court is left with the difficult task of deciding what is its meaning. And it is to be noted that when the Court has decided this, it is not open to either of the parties to maintain that that was not the meaning he intended when he entered into the contract. It is not what a man meant that matters, it is what he gave the other party to understand that he meant, that is to say, the true meaning of the contract as construed by the Court (*j*).

General rule.

The general rule in the construction of contracts is that the plain meaning of the words is to be taken

(*g*) *Scott* v. *Brown*, 1892, 2 Q.B. 724.
(*h*) *Gillies* v. *M'Lean*, 13 R. 12; *Moffat* v. *Stewart*, 14 R. 506; *Clavering* v. *Hope*, 24 R. 944.
(*i*) See *Arrospe* v. *Barr*, 8 R. 602; *Birrell* v. *Dryer*, 11 R. (H.L. 41.)
(*j*) *Stewart* v. *Kennedy*, 17 R. (H.L.) 25.

as conclusively showing what the intention of the parties was.

Latent ambiguities in words.

But there may be a latent ambiguity in the words used in respect that according to the custom of the trade plain words may have a technical meaning different from their ordinary meaning. If this can be shown, then the technical meaning will be adopted. This is not a contradiction of the written contract by parole evidence which is always incompetent, it is merely an explanation of the words used in it supplying as it were the mercantile dictionary in which you are to find the mercantile meaning of the words which are used (*k*). Thus it has been held competent to prove that by the custom of a particular district, "1000 rabbits" meant 1200 rabbits (*l*), and that "good barley" and "fine barley" signified in the trade different things (*m*). Every contract is susceptible of exposition in respect of the use of technical words which, although not ordinarily invested with such a meaning, may by the usage of trade become perfectly well known as having a certain acceptation (*n*). Still more clearly words, which are obviously technical, must be taken technically. They must be translated into ordinary language in order to find the meaning of the contract.

Usage of trade may add stipulations.

The usage of trade, however, may go much further than merely explaining the meaning of words. It may extend, limit, or qualify the contract itself by adding stipulations which are not expressed. In almost all trades customs exist which have this effect.

(*k*) *Bowes* v. *Shand*, 2 A.C. 455.
(*l*) *Smith* v. *Wilson*, 3 B. and Ad. 728.
(*m*) *Hutchison* v. *Bowker*, 5 M. & W. 535.
(*n*) *Jacobs* v. *Scott*, 2 F. (H.L.) at p. 75.

These stipulations are not expressed simply because they are, or are assumed to be so well known to both parties that it is needless trouble to state them expressly (*o*). It lies, however, upon anyone who alleges such a custom to prove that it exists to the effect of being binding upon the other party, and it is obvious that the admissibility and sufficiency of the proof tendered for this purpose must be closely scrutinised.

Stipulations must be definite.

It is clear that the incident or obligation which it is sought to add to the contract must be capable of precise definition. It is proposed to make it part of the contract, and it must, therefore, be as precise as the other obligations already contained in it. Thus where in the case of a contract of Sale or Return it was proposed to prove a custom that if the goods were not to be retained they must be returned within three days or a week or a month, it was held that the alleged custom was too indefinite and the proof was disallowed (*p*).

Customs must be compulsory.

A custom must be compulsory. It must confer a right which the party is entitled to enforce. A proof of what generally happens is not necessarily a proof of usage. Proof is needed to the effect that the usage is compulsory so that persons must conform to it although unwilling (*q*). So if the right is granted merely as a favour or as a convenience, this is not proof of a usage of trade in the sense we are considering (*r*).

Custom must be general.

A custom must prevail throughout a market or

(*o*) *Hutton* v. *Warren*, 1 M. & W., 475.
(*p*) *Grey* v. *Butler's Wharf*, 3 Com. Ca. 67.
(*q*) *Brown* v. *M'Connell*, 3 R. 788.
(*r*) *Petlit* v. *Mitchell*, 12 L.J.C.P. 9; *Meyer* v. *Dresser*, 33 L.J.C.P. 289; *Strathlorne & Co.* v. *Baird*, 1916, S.C. (H.L.) 134.

branch of trade. It is difficult to define accurately the meaning of these terms, but it has been held that the market must be a known and established one, and the custom must be one observed by all those trading in the market (*s*). So the customs observed at Lloyd's are not necessarily customs of the business of marine insurance. A very large proportion of that business is conducted at Lloyd's, but by no means the whole. Much is carried on elsewhere in London and in provincial towns, and business conducted there will not be necessarily regulated by the customs at Lloyd's (*t*). So rules drawn up by a body of merchants, called the Odessa Exchange Committee, will not bind shipowners who had not assented to them (*u*).

The custom must be notorious and so well known that all persons dealing in the market could easily ascertain it and must be presumed to have been aware of it (*v*). It must be so frequent as to warrant an inference that the parties contracted with reference to it (*w*).

Custom must be reasonable.

A custom must be reasonable. It might appear that no custom could have come into existence unless it was reasonable. It is to be observed, however, that when considerable numbers of men of business carry on one side of a particular business they are apt to set up a custom which acts very much in favour of their own side. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom, but if on dispute before a legal forum it is found that they are endeavouring

(*s*) *Mollett* v. *Robinson*, L.R. 7 C.P. at p. 115.
(*t*) *Gabay* v. *Lloyd*, 3 B & C. 793.
(*u*) *Hick* v. *Tweedy*, 6 Asp. M.C. 599.
(*v*) *Grissell* v. *Bristowe*, L.R. 3 C.P. at p. 128.
(*w*) *Rushforth* v. *Hadfield*, 6 East 519.

to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side the Courts have always determined that such a custom if sought to be enforced against a person, in fact ignorant of it is unreasonable contrary to law and void (*x*). So when it was sought to prove that there was a custom in the London tallow trade that a broker employed by a merchant to buy tallow for him was entitled to supply the merchant with tallow belonging to himself, it was held that such a custom was unreasonable and not binding on an outside party ignorant of it. Such a custom is completely at variance with the relation between the parties converting a broker employed to buy into a principal selling for himself and thereby giving him an interest wholly opposed to his duty. No person who is ignorant of such a usage can be held to have agreed to submit to its conditions merely by employing the services of the broker to whom the usage is known to perform the ordinary and accustomed duties belonging to such employment.

If, however, the custom is known to the party against whom it is sought to be enforced it will be binding on him. It will be assumed that he contracted on the basis of the custom however unreasonable it may be.

Must both parties be aware of the custom?

Apart from the case of an unreasonable custom the question arises is it necessary in all cases that the contracting party should know of the custom, can he be held to have contracted subject to terms of which he was in fact not aware ?

(*x*) *Robinson* v. *Mollett*, L.R. 7 H.L. at p. 818.

In one case it was held that endorsees of bills of lading resident in Sydney were not bound by a custom of trade prevailing in Liverpool, where the bills of lading were granted on the ground that they were ignorant of the custom. It was held that when evidence of the usage of a particular place is admitted to add to, or in any manner to affect, the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognizant of the usage and must be presumed to have made their agreement with reference to it. But no such presumption can arise when one of the parties is ignorant of it (*y*).

Again in another case where it was sought to interpret a charter party made in London in terms of a custom of trade alleged to exist at Iquique where the ship was to load a cargo it was laid down that where a custom is purely local it cannot be taken to control or explain the words of a written instrument unless it was known to both parties (*z*).

But other decisions seem to show that these expressions of opinion cannot be applied in all cases. So a shipper of goods at a particular port was held to deal with the shipowners according to the usage and custom of the port and the shipowner was held to have a right to treat the shipper as if he knew the usage although in fact he did not. Business it was said could hardly be carried on otherwise (*a*). Again, in another case it was said that if a man comes and trades in London he must make himself acquainted

(*y*) *Kirchner* v. *Venus*, 12 Moo. P.C. 361
(*z*) *Holman* v. *Peruvian Nitrate Co.* 5 R. 657
(*a*) *Somes* v *Jenkins*, 2 Mar. L.C.O.S. 330.

with the usages of London, and he will be bound by such usages (*b*). In a further case (*c*), a custom of the Bombay trade to pay freight for cotton goods on the measurement of the goods at the port of shipment was proved, but no evidence was given to show that one of the parties had actual notice of the custom. It was said: "Here the contract is entered into between merchants of London and Liverpool cognizant of the Bombay trade, and it relates to a subject matter connected with London, Liverpool, and Bombay Under these circumstances a customary interpretation of the contract may be proved although no proof be given affirmatively that one of the parties had heard or knew of the custom. The jury were justified, indeed, bound to presume that all the parties to the contract were cognizant of the usage which would govern it."

In a case already referred to (*d*) it was said by Lord Blackburn: "It is now thoroughly established that a person who deals in a general market is bound to enquire what its usages are and that those who deal with him have a right to hold him bound by them to the same extent as they would have been entitled to hold a person bound who belonged to the place. He is precluded from setting up as against the persons he dealt with, his ignorance of that which he ought to have known."

This principle was applied in a case (*e*), where a foreign buyer was held bound by a custom of the

(*b*) *Baring* v *Stanton*, 3 Ch. D. 502.
(*c*) *Buckie* v. *Knoop*, L.R. 2 Ex. 125.
(*d*) *Mollett* v. *Robinson*, L.R. 7 C.P. at p. 111.
(*e*) *Societe Anonyme &c.* v. *Scholefield*, 7 Com. Ca. 114.

Newcastle coal trade, whereby in a contract to sell "about" a certain quantity of coal the seller is entitled at his option to a margin of 5 per cent. above or below the specific quantity named.

It thus appears that in the present state of the authorities it does not seem possible to state a general principle covering the point.

Where agent employed.

Where a principal employs an agent to act for him in a particular market it is clear that he will be bound by the usages of the market so long as these are not unreasonable. By employing a broker who acts upon a particular market you authorise him to make contracts upon all such terms as are usual upon the market, otherwise his hands would be tied, and he might not be able to contract at all. Therefore, as regards all such matters as the time and mode of payment, the time and mode of delivery, the various allowances to be made, the mode of adjusting disputes as to quality, and all such matters as arise upon the contract made in the market, the principal will be bound by the usage, but not because he must be supposed to have made enquiries and to have known them, but because they were within the authority conferred upon the agent (*f*).

Custom in consistent with contract

Proof of a custom which is inconsistent with the express or implied conditions in the contract will not be allowed. The parties have contracted otherwise, and the assumption that the parties have contracted on the basis of the custom is excluded. The question in all these cases is whether the incident which it is sought to import into the contract is consistent with

(*f*) *Mollett* v. *Robinson*, cited above.

the terms of the written instrument. If it is repugnant, so that both cannot stand it is inadmissible (*g*).

Evidence of custom of trade is inadmissible to vary the well understood business meaning of words. Thus "approved acceptance" in a mercantile contract is understood to mean an acceptance to which no reasonable objection can be taken. It is not competent to prove that by the custom of a particular trade it means merely an acceptance to which no objection has, in fact, been taken (*h*).

The effect of custom of trade is recognised by the Sale of Goods Act (§ 55), which provides that where any right duty or liability would arise under a contract of sale by implication of law it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage be such as to bind both parties to the contract.

As to a course of dealing between the parties that will have the same effect as a usage of trade. It is in fact a usage of trade as between the parties (*i*). A party will not be entitled to depart from the practice he has followed in the past without due notice to the other party (*j*).

Impossibility of performance.

When a claim is made for breach of contract, it is frequently pled in defence that performance is impossible. It is necessary to consider, therefore, in what cases this defence is valid.

If obviously impossible at time of contract.

We may first put aside cases where the thing

(*g*) *Parker* v. *Ibbetson*, 27 L.J.C.P. 236; *Humphrey* v. *Dale*, 27 L.J.Q.B. 390.

(*h*) *M'Dowall* v. *Snowball Co.*, 7 F. 35.

(*i*) *Bourne* v. *Gatcliff*, 11 Cl. and F. 45; *Ford* v. *Yates*, 2 M. & G. 549.

(*j*) *Cumming* v. *Shand*, 5 H. and B. 95.

stipulated for is according to the state of knowledge of the day so absurd that the parties could not be supposed to have so contracted. In such cases no damages will be given for a failure to perform.

If impossibility only appears subsequently.

But if the impossibility be not of this obvious kind, and is only discovered in the course of executing the contract, such impossibility is no defence. The party has undertaken a contract which he cannot fulfil, and he is consequently liable in damages for the breach. Shipbuilders contracted to build a ship of certain specified dimensions according to a model to be approved of by the buyers, and it was a term of the contract that the ship was to carry a certain deadweight on a certain draught. The model was approved, and it was subsequently found that it was a mathematical impossibility to produce a ship which would fulfil the terms of the contract. The builders were held liable in damages (*f*).

So where a builder had contracted to do certain works by a specified time, as well as any alterations ordered by named persons within the same time, it was held that he could not excuse himself for delay by averring that the alterations ordered were such that it was impossible for him to complete the work within the period specified. He averred also that the employer well knew of this impossibility when he gave the order for the alterations. It was held that if he chose to bind himself by his promise unconditionally to do a thing which he could not possibly perform, under a penalty for not doing it he was bound by the

(*f*) *Gillespie & Co.* v. *Howden & Co.*, 12 R. 800.

bargain (*g*). It seems doubtful, however, that such a decision would now be given.

Impossibility through change in British law.

Where, however, the impossibility of performance arises from British legislation or Government intervention, it will form a good defence. So where the owner of a specific parcel of wheat sold it, but before delivery, and before the property passed to the buyer, the wheat was requisitioned by and delivered to His Majesty's Government under the powers of an Act passed before the date of the contract, it was held that delivery of the wheat by the seller to the buyer having been rendered impossible by the lawful requisition of the Government the seller was excused from performance of the contract (*h*).

Through change in foreign law.

Impossibility of performance, arising from a supervening law of a foreign country, has in a long series of cases been held to be no excuse for non-performance (*i*) A recent case in England, however, seems to be to the opposite effect (*j*). It was there laid down that where a contract requires an act to be done in a foreign country it is, in the absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country. This country should not assist or sanction the breach of the laws of other independent states, and the party will be excused performance. Whether the same

(*g*) *Jones* v. *St John's College*, L.R. 6 Q.B. 115.

(*h*) *Shipton, Anderson & Co.* v. *Harrison Brothers & Co.*, 1915, 3 K.B. 676; *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180; *Metropolitan Water Board* v. *Dick, Kerr & Co.*, 1918, A.C. 119.

(*i*) *Barker* v. *Hodgson*, 3 M. and S. 267.; *Kirk* v. *Gibbs*, 1 H. and N. 810.

(*j*) *Ralli Bros.* v. *Campania Naviera*, 1920, 2 K.B. 287.

result will follow from a law of a foreign state, passed merely for revenue purposes, was not decided.

Where it arises from perishing of a person or thing on which performance depends.

Another case where impossibility of performance excuses non-fulfilment is explained in the following words :—"In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance" (*k*). So where a music hall was let for the purpose of giving concerts and was destroyed by fire before the time came, the owner of the hall was held excused. And where there was a sale of 200 tons of potatoes to be grown on particular lands, and the potatoes suffered from blight so that the seller was only able to deliver 80 tons, the seller was held excused as to the balance. And again, where there was a contract to erect certain machinery upon the buyer's premises, and keep it in repair for two years, and the premises were destroyed by fire while the work was in progress, this was held to discharge the contract (*l*). And in a sale of goods to be shipped at certain ports during a certain month, per a certain ship, there was held to be an implied condition that if at the time of its performance the ship should without default on the seller's part have ceased to exist as a ship fit for the purpose of shipping the cargo, then the contract should be treated as at an end (*m*).

This principle is applied to the sale of goods by § 7 of the Act, which says, that where there is an

(*k*) *Taylor* v. *Caldwell*, 3 B. and S. 826; *Howell* v. *Coupland* 1, Q.B.D. 258; but see *Ashmore* v. *Cox*, 1899, 1 Q.B. 436.

(*l*) *Appleby* v. *Myers*, L.R. 2 C.P. 651; *Leitch* v. *Edinburgh &c. Co., Ltd.*, 2 F. 904.

(*m*) *Nickoll* v. *Ashton*, 1901, 2 K.B. 126.

agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer the agreement is thereby avoided. Of course, this applies only to the sale of specific goods, that is, goods identified and agreed on at the time of the contract. It does not apply to the sale of unascertained goods, say, a sale of 100 quarters of wheat. The seller's whole stock may be destroyed, but this will not relieve him of his contract. He must obtain more elsewhere.

The implied condition involved in the above principle is the continued existence of a given person or thing. Of recent years in England the principle has been extended so as to imply in some cases a condition of the continued existence of a certain state of facts or circumstances, failing which the contract falls. The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of both the contracting parties (*n*). The occurrence may be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation. In every case it is necessary to examine the contract and the circumstances in which it was made, not, of course, to vary, but only to explain it in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done

(*n*) *Horrock* v. *Beal*, 1916, 1 A.C. 512.

so, then a term to that effect will be implied, though it be not expressed in the contract (*o*).

The application of this extended principle to a contract of sale of goods came up in a subsequent case (*p*). Timber to be imported from Finland, and to be delivered to the buyers at Hull, was sold in the early part of 1914. The practice before the war was to load timber into vessels at ports in Finland for direct sea carriage to England, but this practice was not known to the buyers, nor did they know as the fact was, that timber merchants in England do not keep Finland timber in stock. Owing to the outbreak of the war it became impossible for the sellers to obtain any Finland timber, and the sellers contended that the contract had accordingly been dissolved. It was held that the principle in question did not apply, and that the sellers were liable for breach of contract. The buyers did not know that the timber would require to be brought by sea, and, therefore, they could not be deemed to have contracted on the basis of the continuance of that method of transit, that was not a matter which *both* parties contemplated as necessary for the fulfilment of the contract, it was not a matter forming the basis of the contract they entered into.

It is obvious that the application of the principle to ordinary mercantile contracts is a matter of much difficulty, and, no doubt, many cases will arise where parties who find that they have entered into contracts which turn out to be more onerous than they

(*o*) *Tamplin Co.* v. *Anglo-Mexican, &c., Co.*, 1916, 2 A.C. *per* Lord Loreburn at p. 403.

(*p*) *Blackburn, &c., Co.* v, *Allen*, 1918, 1 K.B. 540, 2 K.B. 467.

anticipated, will attempt to plead it. For example, in one case (*v*) where the owners of a ship which had been damaged by fire, and was lying at Singapore, had entered into a contract with a dock company at Hong Kong for her repair, they endeavoured to get out of their contract on the ground that they found that the temporary repairs to the ship which were necessary to enable her to be towed to Hong Kong were much more extensive than they expected. They pled that it was "commercially impossible" for them to implement their contract, but this plea was rejected. It was pointed out that their plea only meant that they had made a bad bargain, and that this could in no view excuse performance of the contract.

(*v*) *Hong Kong & Whampoa Dock Co.* v. *Netherton Shipping Co.*, 1909, S.C. 34.

CHAPTER II.

Formation of the Contract.

A CONTRACT of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. Where the property in the goods is transferred from the seller to the buyer at the time the contract is made, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled, subject to which the property in the goods is to be transferred (§ 1). Definition of contract of sale.

A contract of sale like any other contract may be conditional that is to say it may be stipulated either expressly or impliedly that it is to be carried out only if a certain event occurs, or if something is done by the proposed buyer. If that condition is not fulfilled the contract is void. Contract may be conditional.

Many contracts are by their express terms conditional. So sales of goods "to arrive by a certain ship" are conditional on the arrival of the ship with the goods on board. If the ship does not arrive, or if she arrives without the goods then there is no sale. Condition expressed.

The terms used, however, in contracts of this kind vary greatly, and must be carefully considered. For example, the goods may be described as being in a certain ship and expected to arrive in her. This amounts to a description of the goods as being on the vessel named and is a warranty that they are so. If the ship arrives and the goods are found not to have been shipped in her, this warranty is broken, and as the only condition, namely, the arrival of the ship has been fulfilled the contract stands, and the seller will be liable for his breach of warranty (*a*). And other express conditions of a similar kind are often contained in contracts of sale.

Conditions controlling subsequent dealings with the goods.

Conditions are sometimes inserted in contracts seeking to control the subsequent dealings of the buyer with the goods sold. So manufacturers may sell to merchants with the condition that neither the buyer nor anyone buying from him shall sell the goods at less than a specified price. This condition is valid to the effect that if the buyer does sell at a lower price he will be liable in damages to the manufacturer. But if the buyer sells the goods to a sub-buyer the latter is in no way bound by the condition. There is no contract between him and the manufacturer, and such a condition does not run with the goods so as to affect the sub-buyer, even if he is aware of it (*b*).

Conditions implied.

In many contracts conditions although not expressed are implied by law, as in the case of sale on approval and sale or return, which are conditional on

(*a*) *Gorrissen* v. *Perrin*, 27 L.J.C.P. 29.
(*b*) *Taddy* v. *Sterious*, 1904, 1 Ch. 354; *M'Grather* v. *Pitcher*, 1940, 2 Ch. 306; *Dunlop* v. *Selfridge*, 1915, A.C. 847.

something being done or not being done by the buyer (*c*).

Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading, the property in the goods does not pass to him (§ 19 (3)). The implied condition on which the sale was made has not been fulfilled and the seller may dispose of the goods otherwise as he pleases (*d*). As will be seen later, however, the seller's right to the goods may be defeated if the buyer disposes of them to a *bona fide* third party (*e*). Bill of exchange sent with bill of lading.

A contract of sale of goods may be made in writing, or by word of mouth , or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties (§ 3). Any conduct which implies that the parties have entered into a contract of sale, although nothing has been expressed, is sufficient. A simple example is where one takes up an article exposed for sale in a shop and takes it away. That is a purchase of the article at the price affixed to it, or if no price be affixed, then at a reasonable price. And the same principle may affect important transactions. Contract of sale, how made. Implied from conduct.

In England what has just been stated is subject to an important modification. There a contract for the sale of any goods of the value of £10 or upwards is not enforceable by action, unless the buyer shall In England

(*c*) See p. 53.

(*d*) *Ogg* v. *Shuter*, 1 C.P.D. 47.

(*e*) See p. 92.

accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf (§ 4 (*f*)). This is a large and difficult subject, as to which reference must be made to the English text books (*f*).

Promise.

Even a promise given without consideration is binding in Scotland if undertaken as a final engagement, but not if mentioned only as a probable intention. But the promise must generally be proved by writing or by the oath of the promiser (*g*).

Sale of a ship.

Under the earlier Merchant Shipping Acts it was held that writing was essential in all contracts relating to the sale of a ship or of shares therein. The terms of the Merchant Shipping Act, 1894, are, however, different and writing is not now held to be essential. An action will lie to have a party ordained to execute a transfer of a ship which he has sold by a contract made by word of mouth (*h*).

If there is a formal contract, prior communings cannot be regarded.

It is to be noted that if the communings of the parties, either written or verbal or both, end in a formal written contract purporting to contain a full statement of what has been agreed, then it is incompetent to add terms to that contract by parole evidence as to what had passed between the parties previously. Where parties agree to embody and do actually embody their contract in a formal written deed, then in determining what the contract really was and really

(*f*) Benjamin, p. 175 *et seqq*. (*g*) Bell's *Prin.*, § 8.
(*h*) *M'Connachie* v. *Geddes*, 1918, S.C. 391.

meant, a Court must look to the formal deed and to that deed alone. This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is that the formal contract shall supersede all loose and preliminary negotiations; that there shall be no room for misunderstandings which may often arise and do constantly arise in the course of long, and it may be desultory, conversations, or of correspondence, or negotiations in the course of which the parties are often widely at issue as to what they will insist on and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings, partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation. For example if the formal contract contains no express warranties it is incompetent to offer to prove that in the antecedent communings express warranties were given (*j*).

But surrounding circumstances may be considered.

Quite consistently with this, however, you may, while taking the words of the agreement, look at the surrounding circumstances and see what was the intention. You do not get at the intention as a fact, but you see what is the intention expressed in the words, used as they were with regard to the particular circumstances and facts with regard to which

(*j*) *Buttery* v. *Inglis*, 5 R. *per* Lord Gifford at p. 69, 5 R. (H.L.) 87, 3 A.C. 552; *Paul* v. *Corporation of Glasgow*, 3 F. 119.

they were used. The intention will then be got at by looking at what the words mean in that way, and doing that is perfectly legitimate (*k*).

The subject matter of the contract.

The goods which form the subject of a contract of sale may be either existing goods owned or possessed by the seller or goods to be manufactured or acquired by the seller after the making of the contract of sale, in the Act called future goods (§ 5).

If subject matter has perished at date of contract.

Where there is a contract for the sale of specific goods, that is goods identified and agreed on at the time of the sale, and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void (§ 6). There is obviously an implied condition in every contract of sale that the goods sold are in existence at the time of the sale. If they have perished there can be no contract. If the seller knows that they have perished the case will be one of gross fraud and will be dealt with accordingly, and for that purpose the contract will be held to subsist.

Goods are held to have perished not only where they have ceased to exist but also where they no longer answer to the description given in the contract. So where a cargo of grain was sold and at the time of the sale the grain which had become heated in the ship had been discharged and sold at a foreign port, the contract was held void (*l*).

If subject matter has been damaged.

If at the time of the sale the thing sold has not perished in the sense above stated but is damaged, the result appears to be different. If a specific thing

(*k*) *Inglis* v. *Buttery*, 5 R. (H.L.) *per* Lord Blackburn at p. 103; *Claddach, &c., Co.* v. *Steven*, 1919, S.C. (H.L.), 132.

(*l*) *Couturier* v. *Hastie*, 5 H.L. Ca. 673.

is sold there is no implied warranty as to its quality or condition. If it exists and still answers to the description given in the contract, however much it may be damaged, the contract subsists and the buyer must pay the price. This is the risk run by any buyer who buys a specific thing which he has no opportunity of examining (*m*). The case, as we shall see, is different where unseen goods are bought by description from a dealer. In that case there is an implied condition that the goods shall be of merchantable quality (*n*).

If subject matter perishes before risk passes to buyer.

Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer the agreement is thereby avoided (§ 7). This is an example of the general principle already considered that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance (*o*). Of course, the principle applies only to a sale of specific goods. If the sale be of a certain quantity of unascertained goods the perishing of the whole quantity of such goods in the possession of the seller will not relieve him from his obligation to deliver.

The price, how fixed.

The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. Where the price is not determined in accordance with the foregoing provisions

(*m*) *Barr* v. *Gibson*, 3 M. & W. 390. (*n*) See p. 78.

(*o*) *Taylor* v. *Caldwell*, 3 B. & S. 826; *Howell* v. *Coupland*, 1 Q.B.D. 258.

the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case (§ 8).

Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided, provided that if the goods, or any part thereof, have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor. Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault (§ 9).

The fixing of the price may even be left entirely to the buyer if the parties so contract (*p*).

The price may be fixed by the course of dealing between the parties, and it may be implied to be the same as in previous transactions if nothing is said to the contrary. The question of discount may be similarly settled.

Discount.

Discount in its usual sense means an allowance made to the buyer for prompt payment, and can only be claimed when payment is prompt. But the word is used in a different sense as applying to a case where there is a universal and nominal price for an article, while the fluctuations of the market price or the desirability of establishing an account with a particular individual are met by alterations in the rate of discount allowed to customers, and this discount is allowed irrespective of the time of payment of the

(*p*) *Buchan* v. *Melville*, 4 F. 620; *Lavaggi* v. *Pirie*, 10 M. 312.

account. In such cases the true contract price is the nominal price less the discount which is fixed by agreement, and the true contract price only can be claimed even when payment is delayed (*q*). If, however, the arrangement is not so definite and the allowance is left to the discretion of the seller, he will be entitled on the bankruptcy of the buyer to rank for the full price without deduction of discount (*r*).

(*q*) *Buchanan* v. *Macdonald*, 23 R. 264.
(*r*) *Duncan* v. *Aitchison*, 6 R. 582.

CHAPTER III.

The Passing of the Property and Risk.

When questions arise under a contract of sale it is often of the first importance to determine whether the property in the goods has passed, that is to say, whether the goods have ceased to be the property of the seller and become the property of the buyer. Upon this the rights of the parties may depend.

For example, unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk, whether delivery has been made or not (§ 20).

Again, questions may arise on the bankruptcy of the seller in which this matter is vital. Suppose that the seller becomes bankrupt while the goods remain in his hands undelivered. If the property has passed, the buyer can claim them on tendering the price. They are his and they do not fall into the seller's bankrupt estate. On the other hand, if the property in the goods has not passed to the buyer at the date of the seller's bankruptcy, the goods belong to the seller's creditors, whether the price has been paid or not. And we shall meet with many other cases where the importance of the passing of the

property will appear. The rules which determine this question must now be considered.

General rule in sales of specific goods.

The general rule is that where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. It is a matter entirely in their discretion (§ 17). Thus they may agree that the property is to pass at the time the contract of sale is made, or at the date of the payment of the price, or at any other date which they may agree upon (*a*).

Express agreement.

Where no express agreement.

But in most cases the matter is not present to the minds of the parties when they make the contract, and the time at which the property passes must, therefore, be fixed otherwise. Rules are given in the Act as to this, always provided that no different intention appears from the terms of the contract of the parties or the circumstances of the case.

Rule 1.

(1) Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed (§ 18, Rule 1). Deliverable state means such a state that the buyer would, under the contract, be bound to take delivery of them. In such a case all the conditions necessary to the passing of the property are present, and it is presumed in law, in the absence of any indication to the contrary, that the intention of the parties is that the property should pass at once.

(*a*) See for example *Hogarth* v. *Broomfield*, 9 R. 964; *Bell* v. *White's Trustee*, 22 S.L.R. 597; *Laing* v. *Barclay*, 1908, S.C. (H.L.), 1.

Rule 2.

(2) Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice thereof (§ 18, Rule 2).

Sale of unfinished article.

This will apply to such a case as the purchase of an unfinished article which by the terms of the contract is to be finished complete by the seller. Of course, there is nothing to prevent the purchase of an unfinished article as it stands with or without a separate stipulation that the seller shall finish it. If such an intention is expressed the property will pass at once.

Goods to be delivered at certain place

So, if by the terms of the contract the seller engages to deliver the thing sold at a given place and there be nothing to show that the thing sold is to be in the meantime at the risk of the buyer, the contract is not fulfilled by the seller until he so delivers it. Something remains to be done by the seller with the goods before the buyer under the contract is bound to take delivery of the goods, namely, to convey them to the place named, and until that is done the property remains in the seller and the goods are at his risk (*b*).

Industrial growing crops.

The same principle will apply to sales of industrial growing crops, that is crops which are produced yearly by cultivation, for these are goods in the sense of the Act (§ 62 (1)). In these cases, however, special difficulties arise in determining the point of time at which the property passes when there is no express agreement on the point. These arise of course from the

(*b*) *Calcutta Co.* v. *De Mattos*, 32 L.J. Q.B. *per* Cockburn C.J. at p. 335; *Badische, &c., Fabrik* v. *Basle Chemical Works*, 1898, A.C. 207.

nature of the thing sold, and are well illustrated in a case decided in the Outer House (*c*). In that case a farmer entered into a contract of sale, dated 5th August, in the following terms:—"I sell you my entire potato crop growing this season at the price of £15 per acre, with a reference of £2 per acre up or down. For this I agree to lift, pit, and drive them to the station or harbour, and supply all straw necessary. What waste I require I will receive at £1 per ton." The clause "with a reference of £2 per acre up or down," provided for increase or diminution of price according as the crop turned out good or bad, but the Court was asked to go on the footing that the contract contained a definite standard, by which the amount to be paid by the buyer could be ultimately ascertained. The mode in which such a contract is worked out is that, when the potatoes are mature, they are lifted by the farmer and put by him into pits on the farm, he supplying the necessary straw. The buyer when he wants the potatoes sends his workpeople to lift them from the pits, clean, and sort them, and put them into the buyer's bags. The bags are then carted by the farmer to the railway station or harbour as required by the buyer. After the potatoes were pitted, but before anything further was done, the farmer became bankrupt, and the trustee in his sequestration claimed the potatoes, on the ground that the property in them had not passed to the buyer. The buyer contended that the property had passed at the time of the contract, or alternatively when the potatoes were pitted. The Trustee pled that the in-

(*c*) *Gowans* v. *Bowe*. 2 S.L.T. 112.

tention of the parties was that the property should not pass until the goods were carted to the station or harbour where delivery was to take place, and, in any case, that the property could not pass until the standard had been applied so as to determine the amount of the price. The Lord Ordinary held that the property did not pass at the time of the contract, because the potatoes were not in a deliverable state, but that it did pass when they were pitted because they were then in such a state. He rejected the contention of the trustee that the property did not pass until the price was determined, on the ground that he did not see any sufficient grounds for holding this to have been the intention of the parties. It is to be noted, however, that the trustee did not apparently found on Rule 3 of section 18 presently to be considered. This case has been set out at length not as an authority but to illustrate the difficulties which may arise in contracts of this kind.

It is still an open question in Scotland whether growing trees are goods in the sense of the Act so that contracts of sale relating to them are regulated by its provisions (*d*).

Notice must be given to the buyer.

Not only must whatever requires to be done by the seller to put the goods into a deliverable state be done, but the buyer must have notice, either directly from the seller or otherwise, that it has been done. The passing of the property involves the passing of the risk and the buyer must have notice of this.

Rule does not apply where the thing is to be done after delivery.

This rule does not apply when the thing which has to be done by the seller must be done after the

(*d*) *Morison* v. *Lockhart*, 1912, S.C. 1017.

goods are delivered to the buyer, *e.g.* where the sellers have undertaken to do certain repairs to a ship after the sale and delivery. Nor does it apply where the thing which has to be done is to be done by the buyer not the seller (*e*).

Nor where it is to be done by the buyer.

(3) Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice thereof (§ 18, Rule 3). For example, where all the wheat in a certain binn is sold at so much a quarter, the property does not pass until the wheat is measured and the quantity ascertained. In this case also the buyer must have notice.

Rule 3.

(4) When goods are delivered to the buyer on approval, or on "sale or return," or other similar terms, the property therein passes to the buyer when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction. If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection then the property passes at the time fixed for the return of the goods, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact (§ 18, Rule 4).

Rule 4.

In such cases the sale is conditional in the sense of Section 1 of the Act. Unless and until the buyer does one or other of the things specified there is no

The sale is conditional, and until condition is fulfilled the property and risk are with the seller.

(*e*) *Turley* v. *Bates*, 2 H. & C. 200.

sale, and the property and risk remain with the seller. So in a case of sale on approval where a time was fixed within which a horse must be returned if not approved, the death of the horse, without fault of the buyer, within that time and before it was accepted put an end to the transaction and the loss fell upon the seller (*f*). So also if the buyer becomes bankrupt before he has done anything, the goods do not fall to his creditors (*g*).

Case distinguished from sale with a warranty.

Sometimes it may be difficult to decide whether a case is one of sale on approval or a case of sale with a warranty. So where a horse was sold with a warranty that it was a good worker and sound in wind, and the buyers stipulated that they should have a week's trial, it was held that this was a sale with a warranty, and that the buyers could not return the horse unless it was disconform to the warranty. They could not return it on the ground that they did not approve of it for any other reason (*h*).

Act adopting the transaction.

The position of a person who has received goods on sale or return is that he has the option of becoming the purchaser of them, and may become so in any of the ways specified. One of these ways is the doing of an act adopting the transaction. The selling or pledging of them is such an act, because in either case he no longer has the free control over the goods so as to be in a position to return them. The act is consistent only with his being the purchaser, and by doing it he makes himself purchaser. A pledging of the goods may be in fraud of the seller who intended

(*f*) *Elphick* v. *Barnes*, 5 C.P.D. 321.
(*g*) *Ross* v. *Plano*, 11 S.L.T. 7.
(*h*) *Cranston* v. *Mallow*, 1912, S.C. 112.

that the goods were to be disposed of in the ordinary course of business, but this is immaterial. The act of pledging passes the property in the goods to the buyer by virtue of the act, and he is thus in a position to give a good title to the pledgee if the latter is ignorant of the true facts, and the pledgee can retain the goods as against the seller (*i*).

To avoid fraud by the buyer, another form of contract may be adopted.

In view of this possibility of fraud the transaction is often carried out in different terms. So the goods may be sent, "On approbation. On sale for cash only, or return. Goods had on approbation, or on sale or return remain the property of (the seller) until such goods are settled for or charged." This is not the case of sale or return contemplated by the Act, because an intention as to the time when the property in the goods is to pass different to that specified in the secton is distinctly stated. Until the goods are settled for or charged no property in them passes to the buyer and he can transfer none (*j*).

Mere possession of goods gives no title to dispose of them.

In the case cited the goods had been pledged, and the seller was held entitled to recover the goods from the pawnbroker. The latter argued that, even if no property passed to him, the seller was barred by his conduct from denying it, and it was admitted that if he could show that the seller had so acted as to mislead him into the belief that the person dealing with the property had authority to do so this argument would be good (*k*). But all he could show was that the seller had delivered the goods to the person in question, and this was held not to be enough to raise the plea.

(*i*) *Kirkham* v. *Attenborough*, 1897, 1 Q.B. 201.
(*j*) *Weiner* v. *Gill*, 1906, 2 K.B. 574.
(*k*) *London, &c., Bank* v. *Simmons*, 1892, A.C. 201.

If it were so no one would be safe in parting with the possession of anything (*l*).

In a somewhat similar case a different result was arrived at in Scotland (*m*). The case is distinguishable on the facts, but, in so far as it lays down that the stipulation that the goods were to remain the property of the seller till invoiced by him, had no effect as against a pledge of the goods, it is submitted that the decision is unsound and that the decision of the Sheriff appealed from was right.

Rule 5.

(5) The above rules apply to sales of specific goods. Where there is a contract for the sale of unascertained goods, that is for goods which are not specific or ascertained, no property in the goods is transferred to the buyer unless and until the goods are ascertained (§ 16). Until that is done no goods can be pointed out as the goods which have been sold. The contract of sale is completed in two stages. First there is the contract for an unascertained quantity, *e.g.* 100 tons of coal, and secondly there is the appropriation of certain coals to the contract (§ 18, Rule 5 (1)). What amounts to appropriation in this connection must be carefully considered.

What amounts to unconditional appropriation of unascertained goods.

If the buyer is to select out of the bulk belonging to the seller the goods which he desires, no question can well arise. When he has done so the sale is complete and the property passes.

If, however, the selection be, as it generally is, left to the seller there is often difficulty in deciding the point of time when the appropriation is made. Merely

(*l*) *Farquharson* v. *King*, 1902, A.C. 325; *Weiner* v. *Gill*, 1905, 2 K.B. 172.

(*m*) *Bryce* v. *Ehrmann*, 7 F. 5.

separating from the bulk and setting aside in his own warehouse the required quantity for the purpose of meeting the order is obviously not appropriation by the seller in the sense we are considering. The seller intends to send these separated goods to the buyer, but that does not pass the property in them. He may change his mind and send these goods to another buyer. Something more obviously is required. The goods must be *unconditionally* appropriated to the contract.

Even where the goods are lying in the store of a third party, the mere giving by the seller to the buyer of a delivery order on the warehouseman for the quantity of goods sold does not amount to unconditional appropriation. If the seller has in the store a quantity of goods larger than the quantity he has sold to the buyer, appropriation does not take place until the quantity sold is separated from the mass. The delivery order may have been intimated to the storekeeper and he may have acknowledged that he now holds the specified quantity to the order of the buyer, but as matter of fact no particular goods have been appropriated to the contract, and no property in any particular goods can pass until the quantity sold is separated from the mass in the store (*n*).

The selection of the goods by one party and the adoption of that act by the other converts that which before was a mere agreement to sell into an actual sale and the property thereby passes (*o*). There is an endless variety, however, in the modes in which contracts of sale are carried out and it is often very

(*n*) *Hayman* v. *M'Lintock*, 1907, S.C. 936; *Price* v. *Bank of Scotland*, 1910, S.C. 1095.
(*o*) *Per* Holroyd J. in *Rohde* v. *Thwaites*, 6 B. & C. 388.

difficult to determine, in the first place, which of the parties is entitled to make the selection and, in the second place, whether the other party has adopted the selection.

Who is entitled to appropriate.

The first point depends on the nature of the agreement. Where, in order to carry out the agreement, it falls upon one of the parties to do the first act, and that act cannot be done unless and until specific goods are appropriated to the contract then that party has authority to make the appropriation. Where, for example, the seller is to despatch the goods to the buyer or to do anything to them that cannot be done till the goods are appropriated he has the right to choose the goods (*p*).

Assent to appropriation.

The second point is, has the other party adopted the selection so made, for example, has the buyer adopted the selection made by the seller.

Such assent may be express or implied, and may be given either before or after the appropriation is made. So where the buyer bought 20 hogsheads of sugar out of a quantity of sugar in bulk belonging to the seller. Here it obviously lay upon the seller to appropriate specific sugar to the contract, and he did so by filling it into hogsheads. He then gave notice to the buyer that he had done so, and called upon him to take them away which he promised to do. By so promising he was held to have assented to the appropriation which had been made, and the property was held to have passed upon the sugar having been placed in the hogsheads (*q*). Again, where

(*p*) Blackburn on *Sale*, 2nd Ed., p. 130.
(*q*) *Rohde* v. *Thwaites*, 6 B. & C. 388.

the seller gave notice to the buyer that the goods which he had bought were lying ready for delivery to him at a certain place and requested him to send for them at once, but the buyer neglected to reply promptly, it was held that the property passed to the buyer on the expiry of a reasonable time after receipt of the notice. The buyer was held to have assented by his silence to the appropriation, and the goods having been stolen the loss was held to fall upon him. There were no other goods of the same kind lying at the place indicated so there was no difficulty in determining the goods referred to in the notice (*r*). Again, where a buyer had bought a portion of a specific bulk of goods and had sent his sacks to be filled out of that bulk, the property was held to have passed on the goods being filled into the sacks. No subsequent assent was necessary. It was left to the seller to decide what portion of the bulk should be delivered under the contract, and if the sacks were properly filled nothing remained to be done by the seller (*s*).

But cases on this point run into very fine distinctions, and in some instances the property has been held not to have passed on the ground that it was not shown that there was assent given by the buyer *subsequent* to the appropriation (*t*). The distinction is that in these cases the appropriation was held to have been made by the seller simply on his own responsibility, and that by the terms of the con-

(*r*) *Pignataro* v. *Gilroy*, 1919, 1 K.B. 459.
(*s*) *Aldridge* v. *Johnson*, 26 L.J. Q.B. 296 *per* Campbell, C.J. and Erle, J.
(*t*) *Jenner* v. *Smith*, L.R. 4 C.P. 270; *Noblett* v. *Hopkinson*, 1905, 2 K.B. 214.

tract he had no authority fron the buyer to make the appropriation on his behalf.

Appropriation by delivery to a carrier.

The most common case of appropriation is where, in pursuance of the contract, the seller delivers the goods to a carrier or custodier for the purpose of transmission to the buyer. He is then deemed to have unconditionally appropriated the goods to the contract (§ 18, Rule 5 (2)).

The goods must be appropriated to the buyer at the time they are delivered to the carrier. If they only form part of a larger quantity, which larger quantity is afterwards to be divided among several consignees, and in the meantime they are not distinguished by marks so as to show which particular goods belong to each consignee, the property does not pass until the goods are so divided (*u*). In such a case, however, an insurable interest in the goods may pass to each consignee even before division, because an undivided interest in a parcel of goods, say, on board a ship, may be described as an interest in goods just as much as if it were an interest in every portion of the goods (*v*). But this is entirely different from saying that the property has passed in any particular goods.

If seller undertakes to deliver at a certain place.

If by the terms of the contract the seller undertakes to deliver the goods at a certain place, and in order to do so delivers them to a carrier to be taken to that place, it is obvious that this section of the Act does not apply. In such a case the property in the goods does not pass until the goods arrive at the place appointed.

(*u*) *Healy* v. *Howlett*, 1917, 1 K.B. 337.
(*v*) *Stock* v. *Inglis*, 10 A.C. 263.

Reservation of right of disposal.

But in many cases the seller does not desire that the property should pass to the buyer when they are delivered to the carrier. He desires to retain the property until the price is paid or some other condition has been performed by the buyer. This he can do by delivering them to the carrier subject to his right of disposal (§ 19, (1)).

The object of receiving the right of disposal of the goods is generally to secure that the price shall be paid before the property passes to the buyer. When the goods are sent by sea the seller ships them and takes bills of lading making the goods deliverable to his own order or to that of his agent at the port of discharge. These he transmits to his agent with instructions not to hand them over except on payment of the price. Or he may draw a bill of exchange on the buyer and discount the bill with his own bankers, handing them the bills of lading which their agents at the port of discharge will retain until the bill is paid. In either case, if there is nothing to show the contrary, it is clear that the intention and the effect of so acting is that the property does not pass on shipment of the goods (§ 19 (2)) (*w*).

Instead of acting in either of the ways above suggested, the seller may draw on the buyer for the price and transmit the bill of exchange and the bill of lading to the buyer for payment or acceptance of the former. If the buyer does not honour the bill of exchange he must return the bill of lading. If he does not, no property in the goods passes to him (§ 19 (3)). The protection obtained by the seller in

(*w*) *Mirabita* v. *The Imperial, &c., Bank*, 2 Ex. D. 164.

this case, however, is not complete. If the buyer fraudulently endorses the bill of lading to a third party who acts *bona fide* and without notice of the fraud, the third party obtains a good title to the goods (*x*).

The section of the Act under consideration only applies when the bill of exchange and the bill of lading are sent together to the buyer. If the bill of lading be sent on, the buyer promising to send a bill of exchange in return and he fails to do so, this is simply a breach of contract for which the seller will have his remedy, but it does not rescind the contract, and the property will have passed to the buyer (*y*).

Appropriation of future goods.

The principle of unconditional appropriation applies not only in the sale of unascertained goods, but also in the sale of future goods, that is goods to be manufactured or acquired by the seller after the making of the contract of sale. When A contracts to make a thing for B, no property in the thing while in the process of manufacture vests in B until it has been finished and unconditionally appropriated to the contract. A may change his mind and deliver what he is making to a third person and proceed to make another for B, and if A becomes bankrupt before the thing is appropriated to B, it becomes the property of A's creditors.

Shipbuilding contracts.

But in large contracts of this kind, where instalments of the price are paid as the work of manufacture or construction proceeds, it is necessary for the protection of the buyer that the thing should become

(*x*) *Cahn* v. *Pockett's, &c., Co. Ltd.*, 1899, 1 Q.B. 643.
(*y*) *Wilmshurst* v. *Bowker*, 2 M. & G. 792.

his property as the instalments are paid. For example, in contracts for the building of ships this is so. Here it is generally stipulated that instalments of the price shall be paid as the various stages of the construction of the ship are completed, and that on the payment of each instalment the ship, so far as completed, shall become the property of the buyer. The work proceeds under the inspection of a person appointed by the buyer, and is thus identified and appropriated to the contract. As to work added to the ship after the payment of an instalment, and before another instalment becomes due, that also becomes the property of the buyer by accession, subject of course to payment for its value. This will cover also things which have been fitted to and formed part of the ship, even though at the moment they are not attached to it. But materials provided by the builder and portions of the fabric, whether wholly or partially finished, which are merely intended to be used in the execution of the contract cannot be regarded as appropriated to the contract unless they have been affixed to, or, in a reasonable sense, made part of the corpus (*z*). And this is so, even if it is provided in the contract that the property in such things also is to pass at the same time as the property in the ship. The reason is that in the contract as usually framed there is no contract for the purchase of these things, there is only a contract for the purchase of a ship, and no property can pass in a thing which is not sold (*a*). But there seems to be nothing to prevent the contract

(*z*) *Seath* v. *Moore*, 13 R. (H.L.) 57, 1886, A.C. 350.
(*a*) *Reid* v. *Macbeth*, 6 F. (H.L.) 25; 1904, A.C. 223.

being so drawn as to include a sale of these also, and to provide that the property in them should pass to the buyer when they are approved by his inspector, or otherwise as may be agreed (*b*).

The above principles apply not only to contracts for the building of a ship but to all similar contracts where the price is payable by instalments.

The property in a ship under construction does not always pass to the buyer as above stated. The intention of the parties may be otherwise, and that is to be gathered from the agreement taken as a whole (*c*). And it is often expressly stipulated in such contracts that the property is not to pass until a later date, it may be after all the instalments have been paid. In such cases, if the ship is lost before the property has passed to the buyer the instalments paid fall to be repaid by the seller (*d*).

Although property has passed, the buyer may still reject the completed work.

But although the property in a ship, so far as constructed, may pass to the buyer on the payment of an instalment of the price, this will not prevent the buyer from rejecting the ship when completed if she is not conform to contract. In such a case he will be entitled to recover back the instalments he has paid. If, however, the defect was visible at the time he paid the instalment, and he, in spite of that, accepted the work so far as done without complaint, he may be barred from thereafter raising the point (*e*).

Passing of the risk.

Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to

(*b*) *Reeves* v. *Barlow*, 12 Q.B.D. 436.
(*c*) *Laing* v. *Barclay*, 1908, S.C. (H.L.) 1.
(*d*) *Du Buisson* v. *Swan*, 17 R. 252.
(*e*) *Nelson* v. *Chalmers*, 1913, S.C. 441.

the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not (§ 20).

The general principle of this section of the Act is that any loss of, or damage to, goods must be borne by the person who is the owner at the time. But this, of course, may be superseded by the express or implied agreement of the parties, to be gathered from the terms of the contract. Thus it may be stipulated that the risk is to pass on delivery irrespective of the passing of the property (*f*).

It is to be noted that a purchaser of property which is at the time of the purchase insured against fire in the name of the seller does not by the mere fact of purchase acquire a right to that insurance (*g*). If a fire takes place after the goods are sold, the buyer cannot recover on the seller's policy, nor is he entitled to claim from the seller the benefit of the seller's insurance, unless the seller has contracted to give the buyer such benefit (*h*).

But if it be stipulated in the contract of sale that the seller's policy is to be assigned to the buyer, and this is done, the buyer will be secured (*i*). Such policies are assignable in Scotland (*j*), but not in England, without the consent of the insurers (*k*). In like manner as to marine insurance the rights under the seller's

(*f*) *Brewer* v. *Duncan*, 20 R. 230.
(*g*) *Poole* v. *Adams*, 33 L.J. Ch. 639; *Rayner* v. *Preston*, 14 Ch. D 297.
(*h*) *Martineau* v. *Ketching*, L.R. 7 Q.B. 426.
(*i*) *Landauer* v. *Asser*, 1905, 2 K.B. 184; *Ralli* v. *Universal Marine*, 31 L.J. Ch. 313.
(*j*) Bell's *Prin.*, § 516.
(*k*) *Sadler's Co.* v. *Badcock*, 2 Atk. 554.

marine policy are not transferred unless there be an expressed or implied agreement to that effect Both in Scotland and England such marine policies are assignable (*l*).

(*l*) *Marine Insurance Act*, 1906, §§ 15, 50, & 51.

CHAPTER IV.

Conditions and Warranties.

The word condition is used in this chapter in a different sense from that in which it is used in Section 1 of the Act. There it means something that must happen or be done otherwise the contract is void, here it means something that must be fulfilled by the seller of goods in the performance of the contract, failing which, certain consequences follow. Meaning of condition.

The obligations on the seller under a contract of sale are not all of equal importance. There are some which go so directly to the substance of the contract, or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. Such obligations are called conditions. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. These are called warranties (*a*). Difference between condition and warranty.

In England the consequences following a breach by the seller of a condition and of a warranty, and the remedies thence arising of the buyer, are different. In both cases the buyer is entitled to damages. But in the case of a breach of a condition he has the option Effects of breaches of conditions and warranties in England.

(*a*) *Per* Fletcher Moulton, L.J., in *Wallis* v. *Pratt*, 1910, 2 K.B. at p. 1012.

of another and higher remedy, namely, that of treating the contract as repudiated, provided he has not accepted the goods or part thereof, or, in the case of specific goods, the property has not passed to him. In these two excepted cases, and it may be in others, the remedy of the buyer is confined to damages. Whether a stipulation is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition though called a warranty in the contract (§ 11 (1)).

In Scotland.

The words condition and warranty are used in Scotland in the same senses as in England, but the necessity for distinguishing between them when considering the result of a breach by the seller is avoided, because the remedies of the buyer in both cases are the same. In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages (§ 11 (2)). The expression, "material part of the contract," includes both conditions and warranties and the remedies of the buyer are, therefore, the same whether the breach be of a condition or of a warranty (*b*).

The principal classes of conditions and warranties must now be considered.

Conditions and warranties are either implied by law or they are express.

(*b*) See p. 136.

In every contract of sale, unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass (§ 12 (1)). Implied condition that seller has the right to sell.

The circumstances may, of course, show a different intention, as where the sale is merely that of the seller's interest in the goods or of his rights therein, whatever these may turn out to be.

"Right to sell" means that no one has a superior title to that of the seller in the thing sold, whatever that thing may be. So it does not refer in any way to the quality of the thing. Thus in a sale of a patent machine there is no warranty of the validity of the patent. If the buyer is prevented from using it on the ground that it infringes the patent of another person he has no remedy under this section (*c*).

If the condition in the section is not fulfilled and the buyer is compelled to surrender the goods to one who has a preferable title to that of the seller he can claim a return of the price. So where stolen goods are sold to a series of innocent buyers, and the goods are reclaimed by the real owner from the last buyer (*d*), each buyer can claim a return of the price paid by him to his immediate seller. The effect if he has not.

A similar principle applies where the goods sold are found afterwards to be subject to a charge or incumbrance in favour of any third party, not declared Implied condition that goods free from incumbrances.

(*c*) *Monforts* v. *Marsden*, 1895, 12 Pat. Cas. 266.
(*d*) See p. 85.

or known to the buyer before or at the time when the contract was made (§ 12 (3)). For example, when grain in a store is found to be subject to a lien for past due store rent which the seller fails to pay, the buyer may rescind the sale and recover the price paid.

Implied condition in sales by description.

Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description (§ 13). This is obviously a condition going to the root of the contract. You have bought goods of a certain kind. The seller does not implement his contract by delivering to you goods of a different kind.

Goods are sold by description when the genus or kind to which they belong is specified, *e.g.* wheat or coals, and goods which are in a commercial sense goods of that genus or kind must be supplied. If owing to adulteration or any other cause the goods tendered cannot be described as being of that genus or kind the condition is not fulfilled (*e*).

This case is entirely distinct from a case of warranty of quality presently to be considered which raises different considerations. So, if by the terms of the contract the seller has expressly guarded himself from any responsibility for *quality*, he is still bound to supply goods corresponding to the description (*f*). And similarly clauses in contracts to the effect that a fair allowance is to be made if the quality of the goods is inferior or that the goods are not to be rejected on the ground of inferiority of quality, but the matter is to be referred to arbitration, have no

(*e*) *Jaffe* v. *Ritchie*, 23 D. 242.; *Josling* v. *Kingsford*, 13 C.B. N.S. 447.

(*f*) *Wallis* v. *Pratt*, 1911, A.C. 394.

effect on this fundamental condition implied in the contract. The buyer is entitled to reject the goods if it is not fulfilled (*g*).

Sale by sample as well as by description.

A similar result follows in cases where the sale is by sample, as well as by description. It is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description (§ 13). The sample in such cases is looked upon as a mere expression of the quality of the article not of its essential character, and, notwithstanding the bulk agrees with the sample, yet if the bulk does not reasonably answer the description in a commercial sense the seller has failed to implement his contract (*h*).

Detailed description.

In sales by description the description is often much more detailed than in the cases above considered. The goods bought are not referred to merely as being of a certain genus or kind they are described by the qualities which they must possess or by certain characteristics with which they must correspond. So wood may be sold of specified dimensions (*i*), or goods may be described as shipped at a certain place, within a certain time, per a certain vessel (*j*). In all such cases the goods tendered by the seller must correspond to the description. If, for example, the goods are not shipped at the time specified in the contract the buyer may reject them. It is irrelevant for the seller to say that the goods he tenders are in every way as

(*g*) *Vigers* v. *Sanderson*, 1901, 1 K.B. 608.
(*h*) *Mody* v. *Gregson*, L.R. 4 Ex. at p. 55; *Drummond* v. *Van Ingen*, 12 A.C. 284.
(*i*) *Vigers* v. *Sanderson*, 1901, 1 K.B. 608.
(*j*) *Bowes* v. *Shand*, 2 A.C. 455; *Ashmore* v. *Cox*, 1899, 1 Q.B. 436. But see *Nicoll* v. *Ashton*, 1900, 2 Q.B. 298.

good as those described. They are not the goods which were bought.

Disconformity of a part only.

And it is to be noted that this is so even if the disconformity to description applies only to a portion of the goods tendered. What was bought was a certain quantity of described goods. That quantity has not been tendered and the buyer may reject the whole (*k*).

The term "sale of goods by description" applies to all cases where the buyer has not seen the goods, but is relying upon the description as showing what it is that he is buying. This may be the case even in the sale of a specific thing. So in the purchase of a reaping machine, which the buyer had not seen, but which the seller stated had been new the previous year, and had been used to cut only 50 or 60 acres this was held to be a sale by description (*l*).

Implied conditions in sales by sample.

The same principles apply in sales by sample as in sales by description. Indeed, the cases are practically identical for a sample is in fact a description which speaks for itself.

A sale is by sample when there is a term in the contract express or implied to that effect (§ 15 (1)). Such a case is, therefore, to be distinguished from a sale that is merely induced by sample, the seller showing the sample merely to show the sort of goods he is offering and the sale being concluded without reference to the sample. In such a case if there be fraud on the part of the seller in showing a sample which does not fairly represent the goods the buyer

(*k*) *Jaffe* v. *Ritchie*, 23 D. 242.
(*l*) *Varley* v. *Whipp*, 1900, 1 Q.B. 513.

will have his remedy on the ground of fraudulent misrepresentation, but it is not a sale by sample (*m*).

In the case of a sale by sample there is an implied condition that the bulk shall correspond with the sample in quality (§ 15 (2) *a*).

There is also an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample (§ 15 (2) *b*). If the seller refuses to give him this opportunity the buyer may refuse to go on with the transaction (*n*).

There is further an implied condition that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (§ 15 (2) *c*). If this were not so the sample instead of acting as a safeguard for the buyer would be a means of deceiving him (*o*).

Implied warranties as to quality etc.

But goods tendered under a contract of sale may correspond to description in the sense we have considered, and yet may be of inferior quality or in a bad state or condition or may be unfit for some particular purpose. The question then arises whether there is any warranty in the contract, implied or expressed, which entitles the buyer to reject them or to claim damages.

The Act states broadly that there is no implied warranty or condition as to these matters of goods supplied under a contract of sale except in two cases. Except in these two cases, therefore, the buyer's eye

(*m*) *Magistrates of Glasgow* v. *Ireland*, 22 R. 818.
(*n*) *Lorymer* v. *Smith*, 1 B. & C. 1.
(*o*) *Mody* v. *Gregson*, L.R. 4 Ex. 49; *Drummond* v. *Van Ingen*, 12 A.C. 284.

is his merchant, and he takes the risk of the quality state and condition of the goods. If he desires further protection he must insist on an express warranty. The two excepted cases, however, will be found to cover a large proportion of commercial dealings.

Goods bought for a particular purpose.

The first class of cases in which there is an implied warranty is where the buyer makes known to the seller the particular purpose for which the goods are required. In such cases there is, in certain circumstances, an implied condition that the goods shall be reasonably fit for such purpose (§ 14 (1)).

What is a particular purpose.

The question at once arises what is a particular purpose in the sense of the Act. In Scotland it has been held repeatedly in construing the expression, "specified and particular purpose," occurring in the same connection in the Mercantile Law Amendment (Scotland) Act, 1856, that the ordinary purpose for which all such goods are sold cannot be said to be a particular purpose (*p*). For example, where milch cows were sold for dairy purposes, such purposes were held not to be particular purposes in the sense of the Act, because these were merely the usual purposes for which such cows were always sold. It was held, therefore, that there was no implied warranty that they were fit for such purposes. Apparently the same construction will be put on the expression "particular purpose" occurring in the Act (*q*).

The Court in Ireland has arrived at a different conclusion. In the case of a sale of food (*r*), Lord

(*p*) *Hardie* v. *Austin*, 8 M. 798; *Hamilton* v. *Robertson*, 5 R. 839; *Dunlop* v. *Crawford*, 13 R. 973.
(*q*) *Williamson* v. *Macpherson*, 6 F. 863.
(*r*) *Wallis* v. *Russell*, 1902, K.B.D.(Ir.) 583.

Justice Fitzgibbon said, "The buyer here expressly made known to the seller that the crabs were required for her own eating on the evening of the sale—was the purpose thus made known a particular purpose within the meaning of the Act. I find it impossible to exclude any purpose which is made known to the seller." The Court held that "particular purpose" is not so much particular purpose as distinct from general purpose, but that it is purpose stated to the seller as distinct from absence of purpose stated to the seller.

This construction of the Act has been adopted in England. Where a hot-water bottle was sold, the Court of Appeal held that this was a sale of an article required for the purpose of holding hot water, that this was a particular purpose in the sense of the Act, and that there was an implied warranty that it was fit for that purpose (*s*). Collins, M.R., said, "There are many goods which have in themselves no special or peculiar efficacy for any one particular purpose, but are capable of general use for a multitude of purposes. In the case of a purchase of goods of that kind, in order to give rise to the implication of a warranty it is necessary to show that though the article sold was capable of general use for many purposes, in the particular case it was sold with reference to a particular purpose. But in a case where the discussion begins with the fact that the description of the goods by which they were sold points to one particular purpose only, it seems to me that the first requirement of the subsection is satisfied, namely,

(*s*) *Priest* v. *Last*, 1903, 2 K.B. 148.

that the particular purpose for which the goods are required should be made known to the seller. The sale is of goods, which by the very description under which they are sold, appear to be sold for a particular purpose."

Whichever may be the correct interpretation of the Act certain conditions must exist before the condition as to fitness for the purpose can be implied.

Purpose must be made known to seller.

The purpose for which the goods are required must be made known to the seller. But this need not be done expressly in the contract. It may be implied, for example, where the seller knows what the buyer's trade is, for this may show clearly the purpose for which he requires the goods. It may also be shown from the antecedent negotiations of the parties leading up to the contract itself (*t*).

Buyer must rely on seller's skill or judgment.

The buyer must also show that he relied on the seller's skill or judgment. This also need not be expressed in the contract. It may be implied from the antecedent negotiations, and it is sufficient if it appears from the circumstances of the case that he did so rely, and that the seller knew that he did. Of course, if it appears that the buyer relied on his own judgment in selecting the goods there is no room for the implied condition.

Goods must be of description dealt in by seller.

Further the goods must be of a description which it is in the course of the seller's business to supply. If they are not, the buyer takes the risk of their answering his purpose (*u*).

Sale of article under trade name.

In the case, however, of a contract for the sale of a

(*t*) *Gillespie* v. *Cheney*, 1896, 2 Q.B. 59; *Williamson* v. *Macpherson*, 6 F. 863; *Crighton* v. *Stevenson*, 1908, S.C. 818.

(*u*) *Turner* v. *Mucklow*, 8 Jur. (N.S.) 870

specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose even if that purpose is made known to the seller. The reason is that here there is a purchase of a defined and well-known article. The seller performs his part of the contract by sending that article, and there is no implied warranty that it is fit for any purpose (*v*). Even if the purpose is implied in the trade name of the article as, for example, "Wilson's Patent Gas producers of the 4 cwt. per hour size," there is no implied warranty that the performance of the article will justify its name. It is merely the trade name of the article and nothing more (*w*)

What is a trade name.

The proviso under consideration is intended to meet the case, not of the supply of what may be called for this purpose raw commodities or materials, but for the supply of manufactured articles which have a known name, and are bought and sold under their known name, patented or otherwise. So a sale of coals under a particular description known in the coal trade does not fall under the proviso (*x*).

Whether the article has a patent or trade name under which it can be ordered in the sense of the proviso is a question of fact. It must be shown that there is an article known in trade by that name. It is one thing to order an article known as a Fiat omnibus, an order which is intelligible only if there be such an article known to the public or the trade,

(*v*) *Chanter* v. *Hopkins*, 4 M. & W. 399.
(*w*) *Rowan* v. *Coats, &c, Co.*, 12 R. 395; *Paul* v. *Corporation of Glasgow*, 3 F. 119.
(*x*) *Gillespie* v. *Cheney*, 1896, 2 Q.B. *per* Lord Russell C.J. at p. 64.

it is quite another thing to order an omnibus to be made by the Fiat Company, although in the latter case that Company might adopt patterns and devices which were its own exclusive property. The former is within the proviso the latter is not. An omnibus made by the Fiat Company may well be described as a Fiat omnibus, but such nomenclature does not necessarily constitute a trade name within the Act. If it did a manufacturer could always get the benefit of the proviso by labelling all the goods made by him with his own name. A trade name has to be acquired by user, and whether it has or has not been so acquired is a question of fact in each case (*y*).

Implied warranty of merchantable quality.

The second class of cases in which there is an implied warranty is where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not). In such cases there is an implied condition that the goods shall be of merchantable quality (§ 14 (2)). In these cases, therefore, the goods must not only correspond with the description, but they must be merchantable under that description that is to say, they must be saleable in the market as goods of the description. The case contemplated is where the goods tendered in implement of the contract are damaged to some extent, but not so much that they can no longer be said to be the goods referred to in the contract. Still they can only be sold as damaged goods of that kind (*z*). In such a case the condition is implied and the buyer is entitled to reject the goods.

(*y*) *Bristol, &c., Co.* v. *Fiat Motors Ltd*, 1910, 2 K.B. *per* Farwell, L.J., at p. 839.

(*z*) *Jones* v. *Just*, L.R. 3 Q.B. 191.

If, however, the buyer in such a case has examined the goods there is no implied condition as regards defects which such examination ought to have revealed. In all such cases the buyer's eye is his merchant. What the implied condition protects the buyer from is a latent defect, which cannot be detected by such an examination as a buyer can be expected to make before purchasing. It is not sufficient, however, to exclude the implied condition that the buyer should have had merely the opportunity of inspecting the goods, he must have examined them, and what amounts to an examination depends on the circumstances of the case. A full examination does not appear to be necessary, if he did all that he desired to do and had full opportunity to do more (*a*).

If buyer has examined the goods.

The question arises is there any implied warranty in the case of a sale of food for consumption by the buyer. In England that question seems to be clearly decided in the affirmative and that there is an implied warranty that the food is fit for human consumption (*b*). The ground of these decisions is that in such cases the food is sold for the purpose of human consumption, and that although this is the purpose for which all food is sold it is a particular purpose in the sense of Section 14 (1) of the Act. A warranty that it is fit for that purpose is, therefore, implied. And there is another case in England (*c*), where it was held, although with some doubt on the bench, that in the circumstances in that case Section 14 (2) applied.

Implied warranty in sale of food.

(*a*) *Thornett* v. *Beers*, 1919, 1 K.B. 486.
(*b*) *Jackson* v. *Watson*, 1909, 2 K.B. *per* Farwell, L.J., at p. 202; *Frost* v. *Aylesbury Dairy Co.*, 1905, 1 K.B. 608; *Wallis* v. *Russell*, 1902, K.B.D. (Ir.) 583; *Cointat* v. *Myham*, 1913, 2 K.B. 220.
(*c*) *Wren* v. *Holt*, 1903, 1 K.B. 610.

It was held that these circumstances showed that the food was bought by description within the meaning of that section and that, as examination by the buyer would not have revealed the defect, the seller was liable on an implied warranty that the food was of a merchantable quality.

In Scotland, as we have seen, the sale of food for consumption is not held to be a sale for a particular purpose. Section 14 (1), therefore, does not apply. And it seems very doubtful if Section 14 (2) will be held to apply either. The doubts expressed in England on that point are weighty. If it does not, the result seems to be that there is in Scotland no implied warranty in such cases, because as has been already said the Act declares that there is no implied warranty except as provided in these sections.

Of course, if negligence can be proved on the part of the supplier of the food or of his servants in failing to detect the unsoundness of the food, there will be a good ground of action apart from any warranty implied in the contract (*d*). In the case cited below, such negligence was negatived. No plea of implied warranty was put forward.

Sale of dangerous goods.

Similarly, if the seller sells an article which he knows to be dangerous, without warning the buyer of the fact, he may be liable in damages for the consequences to the buyer. This again is apart from any warranty implied in the sale (*e*).

Implied warranty that goods of seller's own manufacture.

Prior to the Act in the case of sale of goods by a

(*d*) See *Cramb* v. *Caledonian Rly. Co. & Ors.*, 19 R. 1054.

(*e*) *Clarke* v. *Army, &c., Society*, 1903, 1 K.B. 155. As to whether the seller is liable to persons other than the buyer who may be injured, see Benjamin, pp. 511 *et seq.*

manufacturer where there was no express stipulation that the goods were to be of the seller's own manufacture, it was held in Scotland that the seller was entitled to tender goods manufactured by another if they were of value equal to his own (*f*). In England, the seller was held to warrant that they were manufactured by himself (*g*). As no such warranty is mentioned in the Act, it would seem that the Scottish rule will now apply to both countries.

Express warranties.

If the buyer is not disposed to rely upon his own inspection of the goods or upon the implied warranties above considered, he may require the seller to give an express warranty that the goods are of the quality which he desires. If it is given this becomes part of the contract, and if it is not fulfilled the seller may reject the goods or claim damages. It is necessary, therefore, to consider what statements made by the seller amount to express warranties.

Words of commendation.

The words of commendation often used by a seller in reference to his goods are not in general to be taken as warranties. They are taken by the buyer at what they are worth (*h*).

General rule.

But no special form of words is necessary to create a warranty, and the use of the word "warrant," or or of any similar expression, is not required. The rule has been laid down and consistently followed, that any affirmation at the time of a sale is a warranty

(*f*) *West Stockton Co.* v. *Neilson*, 7 R. 1055.; *Johnson* v. *Nicoll*, 8 R. 437.
(*g*) *Johnson* v. *Raylton*, 7 Q.B.D. 438.
(*h*) *Robeson* v. *Waugh*, 2 R. at p. 66; *Wilson* v. *Turnbull*, 23 R. 714.

provided it appear in evidence to have been so intended (*i*). In order to determine this, the whole circumstances of the sale and all that passed between the parties at the time of the sale must be considered. If, for instance, the seller makes a representation which the buyer showed was essential in his mind to make him enter into the contract, such representation will generally be held to be a warranty (*j*). The criterion is the understanding and intention of parties. At one time it was suggested that in determining this question a decisive test was whether the seller assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the seller has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case there would be a warranty, in the latter not (*k*). This, however, is much too broadly stated. The question depends on the intention of the parties to be deduced from the whole of the evidence, and the circumstance that the seller assumes to assert a fact of which the buyer is ignorant, though valuable as evidence of intention is not conclusive of the question (*l*).

It will not be lightly assumed that any statement amounts to a warranty. It lies on the party alleging a warranty to prove clearly that a warranty was given. For example, a bare affirmation of the soundness of a horse then exposed to the buyer's inspection is not in itself a warranty. It is of itself only a

(*i*) *Pasley* v. *Freeman*, 3 T.R. 51.
(*j*) *Scott* v. *Steel*, 20 D. 253.
(*k*) *De Lassalle* v. *Guildford*, 1901, 2 K.B. 215 at p. 221.
(*l*) *Heilbut* v. *Buckleton*, 1913, A.C. 30.

representation. The buyer must show that it was intended to be a warranty.

As has been said a warranty, if given, forms part of the contract. It follows from this that statements made prior to the contract to induce the buyer to enter into it, but which do not form part of the contract are not warranties. They are merely representations (*m*).

It is important to distinguish between a warranty of fact and a mere expression of opinion. The seller in the latter case is not responsible for the correctness of the opinion if he honestly held it, but it is to be noted that in this case the party represents that what he says is really his opinion. If it is not, then it is a case of fraudulent misrepresentation of a fact. The distinction between the two cases is well illustrated in sales of pictures. In the case of old pictures the assertion that they are by a certain master can in most cases be only the expression of an opinion, while in the case of modern pictures it may be ascertainable as a matter of fact. It will, therefore, be much easier to establish a warranty of fact in the latter case than in the former (*n*).

Parole evidence of warranty when contract in writing.

Where the contract is in writing, but contains no warranty or expresses a particular warranty as given, parole evidence is inadmissible to prove its existence in the former case, or to extend it by inference or implication in the latter (*o*). But a mere receipt for the price, whether it does or does not contain anything

(*m*) *Harrison* v. *Knowles*, 1918, 1 K.B. 608.
(*n*) *Jendwine* v. *Slade*, 2 Esp. 572; *Power* v. *Barham*, 4 A. & E., 473; *Hyslop* v. *Shirlaw*, 7 F. 875.
(*o*) *Kain* v. *Old*, 2 B. & C. 627.

about warranty, will not exclude parole evidence of the terms of the contract, such receipt not being a reduction of the contract to writing with the purpose of ascertaining its terms (*p*).

An express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith (§ 14 (4)). So a warranty of fitness for a particular purpose may be implied and superadded to express warranties contained in the contract (*q*).

(*p*) I. Bell's *Com.* 466 note, *Allen* v. *Pink*, 4 M. & W. 140.
(*q*) *Douglas* v. *Milne*, 23 R. 163.

CHAPTER V.

Transfer of Title.

Speaking generally no one can sell goods and give a good title to them to the purchaser except the owner, or some one having his authority or consent. In a sale by anyone else the buyer acquires no better title to the goods than the seller had (§ 21) (*a*). General rule

According to Scots law a thief cannot give a good title to a purchaser from him of goods which he has stolen, however innocent the purchaser may be of any knowledge of the theft. The true owner can reclaim the goods at any time from the purchaser without payment. If the innocent purchaser from the thief has consumed the goods, or has by a process of manufacture changed their character, *e.g.* has made oil into lard compound and sold it to his customers, he must pay the value of the goods to the original owner (*b*). If the goods have passed through the hands of a series of purchasers, all equally innocent, the true owner has a claim only against the last purchaser in whose possession the goods are found, unless, indeed, the intermediate parties have made profits on their transaction (*c*). This can only be in a case where the original owner has been unable to recover the goods. If they Sale by a thief in Scotland.

(*a*) *Farquharson* v. *King*, 1902, A.C. 325.
(*b*) *International Corporation* v. *Ferguson*, 1910 S.C. 182.
(*c*) Bell's *Prin.*, § 527.

have been recovered from the last purchaser, each of the series of sellers will have to repay to his buyer the whole price received, and so none of them will make a profit (*d*).

In England.

In England the law is different and a *bona fide* purchaser is protected where the goods are bought in market overt (§§ 22 and 24) (*e*). This may affect the case of a sale in Scotland of stolen goods. For example, where a horse was stolen in Ireland (where the law is similar to that in England) and afterwards sold to a *bona fide* purchaser there, in such circumstances that he obtained a good title and he afterwards sold to a *bona fide* purchaser in Scotland, the latter was held to have obtained a good title also (*f*).

Mere possession gives no power to dispose of goods.

Mere possession of goods or of the documents of title to goods gives no power to dispose of them. Such possession is inevitable in many circumstances which exclude all idea of a right to do so, and persons buying goods have no right to suppose and act on the supposition that the person in possession has such a right (*g*). For example, a clerk in a merchant's office must often be in possession of bills of lading or other documents of title for the purposes of his employer's business. A sale or other disposition of these by a clerk can have no more effect than in the case of a thief. So goods in the hands of a warehouseman, or in the hands of a lessee under a contract of lease, cannot be sold by the person in whose possession they are. The buyer would get no title (*h*).

(*d*) See p. 69. (*e*) See Benjamin, pp. 17 *et seqq*.
(*f*) *Tod* v. *Armour*, 9 R. 901.
(*g*) *Farquharson* v. *King*, 1901, 2 K.B. 697.
(*h*) *Cole* v. *N. W. Bank*, L.R. 10 C.P. 354.

But the position and the nature of the business carried on by the person in whose possession the goods are may validate transactions carried out by him, which in point of fact he had no right to enter into.

But position of the party may validate the transaction.

A mercantile agent is one who has, in the customary course of his business, as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods. If a merchant places his goods or the documents of title to the goods in the possession of such an agent, the latter may deal with them in any of these ways in the ordinary course of business of a mercantile agent, and his transactions will be as valid as if he were expressly authorised by the owner of the goods to make the same. The particular disposition of the goods which he makes may not have been authorised by the principal, in fact it may be directly contrary to his instructions, but if this is unknown to the person with whom he deals, the transaction is valid and such person obtains a good title to the goods.

Mercantile agents.

This is the effect of The Factors Act, 1889, which was passed for the protection of persons dealing in the market with parties who, to all appearance, have full power to dispose of goods in their possession in the ordinary course of business. The object of the act is to prevent transactions with such persons from being upset by unknown principals appearing and maintaining that the transaction was unauthorised by them. Where, therefore, goods are bought from a person who carries on a business in which there is

Factors Act 1889.

in the customary course authority to sell, for example, the business of a picture dealer, the buyer, provided he acts in good faith and without notice of any limitation of the authority of the person selling, obtains a good title to the goods under the Act, notwithstanding that the goods were in fact entrusted to the person selling on condition that no offer should be accepted until the real owner was referred to or unless a particular price was obtained (*i*).

Definition of document of title.

The expression "document of title" means any document used in the ordinary course of business as proof of the possession or control of goods, such as, bills of lading, delivery orders, and the like (*j*).

What must be proved to bring the case under the Act.

Seeing that at common law an agent has no authority to deal with goods belonging to his principal beyond the authority given to him, either expressly or impliedly, by the principal, a party dealing with an agent must, if he is to get the benefit of the Act, show

That the person was a mercantile agent.

that his case falls within it. He must show that the person with whom he dealt was a mercantile agent in the sense of the above definition.

For example, where articles of jewellery were sent by the manufacturer to a retail jeweller for sale, and it was stipulated that the goods were to remain the property of the manufacturer until sold or paid for, and the jeweller was to be paid a commission for selling them, it was held that the jeweller was a mercantile agent, and as such had implied authority to pledge the goods (*k*). There was in this case an

(*i*) *Turner* v. *Sampson*, 27 T.L.R. 200.
(*j*) *Factors Act*, 1889, § 1 (4).
(*k*) *Weiner* v. *Harris*, 1910, 1 K.B. 285, overruling *Hastings* v. *Pearson*, 1893, 1 Q.B. 62.

ambiguity created by the use of the term "sale or return" in the letter appointing the agent, but on a construction of the whole document the Court came to the conclusion that it was a mercantile agency in the sense of the Act.

That the agent was in possession with consent of the owner.

It must further appear that the party is in possession of the goods, or of the documents of title to the goods, with the consent of the owner. This, however, will be presumed in the absence of evidence to the contrary (*l*). It is sufficient to show that the possession has been with the consent of the owner. Even if that consent has been withdrawn, and the owner has demanded redelivery of his goods from the agent, any disposition of the goods by the agent will be valid provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined (*m*).

But if it be shown that the goods or documents have been obtained by theft or by what is equivalent to theft (what is called in England larceny by a trick), this cannot be said to be with consent of the owner and the Act does not apply (*n*). But if the party has obtained possessoin by means of fraud, the case is different (*o*). In such a case he has obtained possession with the consent of the owner, albeit that that consent may be recalled at the owner's option, and the Act applies.

That the agent was acting in the ordinary course of business of a mercantile agent.

In order to bring the case under the Act it must

(*l*) *Factors Act*, 1889, § 2 (4).

(*m*) *Factors Act*, 1889, § 2 (2); *Moody* v. *Pall Mall Co.*, 22 T.L.R. 306.

(*n*) *Oppenheimer* v. *Fraser*, 1907, 2 K.B. 50.

(*o*) *Cahn* v. *Pockett's, &c., Co.*, 1899, 1 Q.B. 643.

further be shown that the agent was acting in the ordinary course of business of a mercantile agent. This seems to mean that the transaction is to be validated if the agent has acted in the transaction as a mercantile agent would act, that is to say, that the sale or whatever the transaction is must not take place outside business hours, or under circumstances under which a mercantile agent in the trade would not ordinarily transact business. So where the agent employed another person to pledge the goods for him, this was held not to be in the ordinary course of business of a mercantile agent, and the transaction was held not protected by the Act (*p*). And where the mercantile agent sent the goods to an auctioneer to be sold, and subsequently got an advance from the auctioneer on security of the goods, the same decision was given (*q*). The authority given to an agent by the Act is a general authority given to every mercantile agent, and is not restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them (*r*).

A pledge by an agent does not cover past due liability.

A certain amount of protection is given to the owner of goods against unauthorised dealings with the goods on the part of the agent by the provision in Section 4 of the Act, that where a mercantile agent pledges the goods for a debt or liability of his own, due before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the agent at the time of the pledge.

(*p*) *De Gorter* v. *Attenborough*, 21 T.L.R. 19.
(*q*) *Waddington* v. *Neale*, 96 L.T. 786.
(*r*) *Oppenheimer* v. *Attenborough*, 1908, 1 K.B. 221.

A pledge of the documents of title to goods is deemed to be a pledge of the goods (§ 3) (*s*). Mode of pledging.

We have now considered the protection given by the Factors Act to persons dealing with mercantile agents in possession of goods or documents of title belonging to their principals. The Act goes on, however, to give similar protection to persons dealing with sellers and buyers in possession of goods, the property in which has passed from them or which is not yet vested in them in the respective cases. These provisions are contained in Sections 8 and 9 of the Factors Act, 1889, which are practically re-enacted in Section 25 of the Sale of Goods Act. Similar principle cases of sellers and buyers of goods.

These sections provide that where a person has sold goods but continues in the possession of them, or of the documents of title to them, although the property has passed to the buyer, he may sell them over again to a third party, and if that third party gets delivery of the goods in good faith and without notice of the previous sale, he gets a good title to them. A pledge or any other disposition of the goods is equally valid (§ 25 (1)). If, however, the goods have not been delivered to the second buyer the first buyer's title will be preferable to his.

So, conversely, if the buyer in a contract of sale in which the property in the goods has not yet passed to him obtains possession of them, or of the documents of title to them with the consent of the seller, the buyer may sell, pledge, or otherwise dispose of the goods to a third party, and if that third party gets

(*s*) See p. 98.

delivery of the goods in good faith and without notice of any lien or other right of the original seller in respect of the goods he will obtain a valid title to them (§ 25 (2)). This principle applies even where the buyer has obtained possession of the goods by fraud. For example we have seen that where a seller draws on the buyer for the price of goods and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, then if the buyer does not honour the bill of exchange the property in the goods does not pass to him (§ 19 (3)) (*t*). But in such a case if the buyer fraudulently disposes of the bill of lading to an innocent third party, that third party gets a good title to the goods under Section 25 (2). In such a case the fraudulent buyer has obtained possession of the bill of lading with the consent of the seller. The facts that he is in breach of his duty in not accepting the bill of exchange, and that consequently no property in the goods has passed to him are immaterial in a question with one dealing with him in ignorance of these facts. It is immaterial also that consent to his *retaining* possession of the bill of lading was subsequently withdrawn, this also being unknown to the third party. He is, therefore, able to pass a good title to the *bona fide* third party (*u*).

The case, however, in which the principle comes most often into play is in the contract of hire-purchase, considered later (*v*).

(*t*) See p. 41.
(*u*) *Cahn* v. *Pocketts, &c., Co.*, 1899, 1 Q.B. 643.
(*v*) See p. 171.

Lastly, we note that in some cases persons other than the owner have power at common law or by statute to sell goods. For example, the master of a ship has power to sell her in certain cases of extreme necessity, pawnbrokers have limited rights to sell goods pawned with them and the like.

CHAPTER VI.

Delivery of the Goods.

Seller's duty to deliver.

Following upon a contract of sale it is the duty of the seller to deliver the goods, always provided that the buyer is ready to perform the obligations incumbent upon him under the contract (§ 27).

Sales for cash.

When the sale is for cash, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for the possession of the goods (§ 28).

Where nothing is said in the contract as to the time of payment and nothing can be implied as to this from the custom of trade or the course of dealing between the parties, the sale is held to be for cash (*a*).

Sales on credit.

If the goods are sold upon credit either expressly or impliedly and nothing is agreed upon as to the time of delivering the goods, the buyer is immediately entitled to the possession, and the right of possession and the right of property vest at once in him. But his right of possession is not absolute. It is liable to be defeated if he becomes insolvent before he obtains possession. In such a case the seller is not obliged to deliver the goods and run the risk of having to

(*a*) *Hall* v. *Scott*, 22 D. 413.

rank on the buyer's bankrupt estate for the price (*b*). This principle has an extended application in the case of instalment contracts, a subject to be considered presently. Goods were sold to be delivered in instalments, payment to be made in cash fourteen days after each delivery. The whole amount was delivered except the last instalment, but the immediately previous instalment had not been paid for when the buyer become insolvent. The seller refused to deliver the last instalment till the price, not only of it, but of the previous instalment, was tendered in cash, and he was held entitled to take up this position (*c*). A person is deemed to be insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due (§ 62 (1)). In the earlier authorities it was said that the seller has the right of withholding goods sold on credit if the buyer is *vergens ad inopiam*, which seems to suggest a state of embarrassment short of insolvency. No case of this sort is reported in recent times, and the phrase is in any event very vague and must always be difficult to justify by proof. Probably the seller can only be entitled to take so grave a step if the buyer is insolvent in the sense above given.

If in the case of a cash sale the seller gives possession of the goods without insisting on payment of the price the transaction becomes a sale upon credit (*d*), with the result that the buyer will be entitled

(*b*) *Tooke* v. *Hollingsworth*, 5 T.R. 215; *Bloxam* v. *Sanders*, 4 B. & C. 941.
(*c*) *Ex parte Chalmers*, L.R. 8 Ch. 289; *Morgan* v. *Bain*, L.R. 10 C.P. 15.
(*d*) *Richmond* v. *Railton*, 16 D. 403.

to set off counter claims against the price (*dd*). But if the buyer gets possession without the consent of the seller he must return the goods if he does not pay the price (*e*).

Actual delivery.

Delivery of possession may be either actual or constructive. It is actual when the goods themselves are handed over to the buyer or there is otherwise a manifest change of custody, as where the key of a warehouse or other repository is handed over (*f*).

By endorsation of bills of lading.

Actual delivery is also made by endorsing and handing over the bill of lading for the goods. Bills of lading are, by the law merchant representatives of the goods mentioned therein. Indorsation and delivery of a bill of lading is equivalent, therefore, to actual delivery of the goods, subject, however, to the unpaid seller's right to stop the goods in transit (*g*) The bill of lading remains in force for this purpose as long as the engagement of the shipowner has not been completely fulfilled, for example, while the goods are lying at a sufferance wharf where they have been landed for the convenience of the parties (*h*). But it is to be noted that the indorsation of a bill of lading gives no better right to the goods than the indorser himself had. A bill of lading is not negotiable in the sense that a bill of exchange is negotiable. So if a bill of lading which is blank endorsed is lost or stolen, the finder or thief can confer no title upon an innocent third person bytransferring it to him (*i*).

(*dd*) *Cornforth* v. *Rivett*, 2 M. & Sel. 510.
(*e*) *Bishop* v. *Shillito*, 2 B. & Ald. 329 ; *Watt* v. *Findlay*, 8 D. 529.
(*f*) *West* v. *Mair*, 20 R. 64.
(*g*) *Lickbarrow* v. *Mason*, 6 East 20.
(*h*) *Barber* v. *Meyerstein*, L.R. 4 H.L. 317.
(*i*) *Gurnet* v. *Behrend*, 3 E. & B. 622.

Position of other documents of title.

Bills of lading are the only documents of title to goods which are regarded as representatives of goods in the sense above explained.

All other documents of title, such as dock warrants, warehouse-keeper's certificates, and delivery orders are in a different position. As the law now stands, delivery of a delivery order or the indorsation and delivery of a dock warrant or warehouse-keeper's certificate is not equivalent to delivery of the goods, unless delivery of these documents is followed by intimation to the warehouse-keeper, and acknowledgment by him that he now holds the goods on behalf of the new owner (§29 (3). When goods, therefore, are pledged by the owner in security of an advance, and the owner transfers such documents of title to the lender, the latter obtains no real security over the goods unless and until he takes the steps above pointed out. It is not delivery of the goods, and delivery is essential to the validity of a pledge. And this is the case, even if the dock warrant or the certificate bears that the goods are deliverable to the owner or his assigns (*j*).

Proposed change in the law.

Business men have often expressed dissatisfaction with this state of the law, and have urged that all documents of title should have the same force and effect as bills of lading, that is, that the mere handing over of a delivery order or other document of title to the goods by the owner to, say, a pledgee should be held to be equivalent to delivery of the goods. There appear, however, to be grave objections to such a change in the law. The possession of a quantity of

(*j*) *Inglis* v. *Robertson & Baxter*, 25 R (H.L.) 70.; *Hayman* v. *M'Lintock*, 1907, S.C., 936.

goods in store is a source of credit to the owner. If it were made possible for him to burden and charge such goods by simply handing over a delivery order, without anything further being required to be done in the way of making the transaction public, this source of credit might be illusory. But a more serious objection to such a change is that it would open the way to fraud. There would be little to prevent an owner of goods from obtaining advances from two or more lenders on security of the same goods. At present when each lender is obliged to intimate his delivery order to the warehouseman without delay, such a fraud will be immediately detected. If this were altered, intimation might be delayed, and the fraud remain undetected until too late to take decisive steps. This danger actually exists in the case of bills of lading, which are often drawn in sets of three or more, and it has been commented upon by very eminent judges (*k*). In such cases it may be noted that the first endorsement in date is preferable to the later, even if the later endorsee has obtained delivery of the goods, and the latter is consequently obliged to hand over the goods and is left without the security which he bargained for.

But as we have seen in the case where a mercantile agent pledges goods belonging to his principal, a pledge by him of the documents of title is deemed to be a pledge of the goods (*l*). The curious result, therefore, is that, as the law stands at present, an agent can do what a principal cannot do.

(*k*) *Glyn* v. *East, &c., Dock Co.*, 7 A.C. 591.
(*l*) Factors Act, 1889, § 3.

It has become common to insert into private Acts relating to harbours, provisions to the effect that in contracts relating to goods stored in the harbour warehouses, the delivery of a documents of title shall be equivalent in all respects to delivery of the goods. The effect of such provisions upon the common law has not yet been considered, but it would appear to be a curious state of things that one law should prevail in one warehouse and another law should prevail in another warehouse in the same town. It may be explained that all these anomalies seem to have arisen from the piecemeal manner in which the matter has been dealt with by legislation. A comprehensive measure dealing with the whole subject seems much required.

Although the delivery of documents of title, other than bills of lading, is not equivalent to delivery of the goods, such delivery may have important effects in limiting the rights of an unpaid seller. This subject will be considered in its place (*m*).

Constructive delivery.

We have now considered the question of actual delivery. Delivery of possession may, as has been said, also be constructive. This takes place where the goods at the time of the sale are in the actual possession of a third person, such as an independent warehouseman, and such third person acknowledges to the buyer that he now holds the goods on his behalf (§ 29 (3)). The typical case is where a delivery order on the warehouseman is handed over by the seller to the buyer, and we have already considered this in connection with actual delivery.

(*m*) See p. 148.

It is to be noted, however, that in order to there being constructive delivery the warehouseman must be an independent third person. If he be merely a person in the employment of the seller there can be no such constructive delivery. The goods remain in the possession of the seller, although the delivery order be intimated to his storekeeper (*n*).

Time of delivery.

Delivery of goods must be made at the time specified in the contract, if any time be specified. If not, the seller will be liable in damages, unless the delay has arisen from a cause excepted in the contract. And the buyer is entitled to set off such damages against the price, and to refuse payment until he has the opportunity of establishing the amount of the damages he has suffered through the delay in delivering the goods. This is on the ground that, as the seller has failed to perform his part of the contract, he is not entitled to call upon the buyer to fulfil his part (*o*). And the buyer has this right even if no time of delivery is stipulated in the contract if delivery has not been made within a reasonable time (*p*).

Delay in delivery may entitle buyer to rescind contract.

But in some cases delay in delivery by the seller will entitle the buyer to rescind the contract. This will be so when the time of delivery is of the essence of the contract (§ 10). It is impossible to define accurately the meaning of this term. But where it can be shown that the buyer regarded the time of delivery as so important that, but for the stipulation,

(*n*) *Anderson* v. *M'Call*, 4 M. 765; *Distiller's Co.* v. *Dawson*, 16 R. 479; *Dobell* v. *Neilson*, 7 F. 281.
(*o*) *Macbride* v. *Hamilton*, 2 R. 775.
(*p*) *British, &c., Co.* v. *Shaw, Ltd.*, 1914, S.C. 922.

he would not have entered into the contract, it will be held, in the absence of evidence of a contrary intention of the parties, that the stipulation is of the essence (*q*). So when it can be shown that damages will not adequately recompense the buyer for the breach. The whole facts of the case must be taken into consideration, and it must be shown that the delay in delivery produces a state of matters substantially different from that contemplated in the contract (*r*). If that be shown, the buyer will be held entitled to refuse to take delivery and to pay the price.

Risk where delivery delayed.

Where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault (§ 20). Where the property in the goods has passed, the goods are in the ordinary case at the risk of the buyer, even while they remain in the possession of the seller. But if they are in his possession by his fault in failing to deliver them according to contract, the risk remains with the seller, unless he can prove that the loss must have occurred even if he had so delivered them.

Stipulations as to time.

In stipulations as to time the word "month" is understood to mean a calendar month, "days" are counted as consecutive days including Sundays, but exclusive of the day of the contract and delivery must be made at a reasonable hour, which is a question of fact (§ 29 (4)).

(*q*) *Menzies* v. *Menzies*, 20 R. (H.L.) at p. 142.
(*r*) *Macbride* v. *Hamilton*, 2 R. 775; *Grieve* v. *Konig*, 7 R. *per* Lord Shand at p. 524; *Paton* v. *Payne*, 35 S.L.R. 112; *Shaw* v. *Waddell*, 2 F. 1070; *Dunford* v. *Macleod*, 4 F. 912; *Wade* v. *Waldon*, 1909, S.C. 571; *Hartley* v. *Hymens*, 1920, 3 K.B. 475.

A stipulation to supply an article "as soon as possible," means that the makers will supply it as quickly as the means at their disposal may allow, and a delay caused by prior orders seems to be excusable (*s*). But the facts of a particular case may show that a stricter interpretation must be put upon the expression (*t*).

If no time stipulated.

If the contract does not expressly or by implication fix any time for delivery, the law implies that the delivery must be within a reasonable time (§ 29 (2)). This means that the seller duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably (*u*). The reasonableness must be determined according to the circumstances as they exist at the time when delivery ought normally to be made. So strikes of workmen and similar causes of delay must be allowed for.

Place of delivery.

As to the place at which delivery is to be made, which involves the question of the expense of taking the goods to and from that place, this depends upon the terms of the contract. So it may be stipulated that the goods are to be delivered at the buyer's address, or are to be delivered free on board ship as directed by the buyer, and the like. Apart from any such contract express or implied, the place of delivery is the seller's place of business if he have one, and, if not, his residence. If, however, the contract be for

(*s*) *Attwood* v. *Emery*, 1 C.B.N.S. 110.
(*t*) *Hydraulic, &c., Co.* v. *M'Haffie*, 4 Q.B.D. 670.
(*u*) *Hick* v. *Raymond*, 1893, A.C. 22; *Taylors* v. *Maclellans*, 19 R. 10.

the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery (§ 29 (1)). Unless otherwise agreed the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller (§ 29 (5)).

Quantity tendered.

The seller must deliver to the buyer the quantity of goods sold, no more and no less. If he delivers less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate (§ 30 (1)).

Similarly, where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate (§ 30 (2)).

The excess or deficiency in quantity tendered must be such as is capable of influencing the mind of the buyer. Anything less will be disregarded (*v*).

The quantity of goods sold is sometimes stated to be "about" a named quantity, or some similar expression is used. Questions then arise as to what quantity amounts to a good tender. If there is nothing else in the contract to define the quantity more accurately, such qualification of the quantity named is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight. What is a fair and reasonable margin must be determined

(*v*) *Shipton* v. *Weil*, 1912, 1 K.B. 574.

by the circumstances of each case. But where a contract is made to sell goods, the quantity of which is identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, and the quantity is named with the qualification of "about," or "more or less," or words of like import the contract applies to the specific lot so identified, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount in reference to which good faith is all that is required of the party making it. So in a contract to supply "the whole of the steel required for the Forth Bridge," "the estimated quantity of the steel, we understand, to be 30,000 tons more or less," it was held that the sellers must furnish and the buyer must accept the whole of the steel required, although that much exceeded the quantity named (*w*). A contract to supply a buyer with his "requirements" will be interpreted in accordance with the facts as to what may fairly be regarded as within the contemplation of parties when the contract was entered into (*x*).

Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the

(*w*) *Tancred, Arrol & Co.* v. *The Steel Company of Scotland*, 17 R. (H.L.) 31. *In re Harrison* 1917 1 K.B. 755.

(*x*) *North British Oil Co.* v. *Swann*, 6 M. 835; *J. von Mehren & Co.* v. *The Edinburgh, &c., Co.*, 5 F. 232; *Blackloch* v. *Kirk*, 1919, S.C. 57.

whole (§ 30 (3)). This occurs in cases where the goods contracted for are delivered mixed up with goods of a different description altogether, and in such a way that they cannot be readily separated, *e.g.* when timber of certain dimensions is sold and it is delivered mixed up with timber of different dimensions. It does not apply to cases where all the goods delivered are of the kind contracted for, but part of them are not of such quality as the seller was bound to supply. In such a case the buyer is not entitled to pick out the good and reject the bad. The ordinary rule applies, that he must keep the whole or reject the whole, claiming a deduction from the price in the one case and damages for breach of contract in the other (*y*).

Instalment contracts.

Unless otherwise agreed the buyer of goods is not bound to accept delivery thereof by instalments (§31 (1)).

If one party is in breach of the contract, what are the rights of the other party.

But it is very commonly otherwise agreed and contracts are constantly made for the sale of goods to be delivered by stated instalments which are to be separately paid for. In such cases if the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, questions frequently arise as to the rights of the party not in default. It is clear, of course, that he can recover damages in respect of the breach of contract of the other party in respect of the particular instalment. But is he, in addition, entitled then and there to wash his hands of the contract and refuse to go on further with it.

(*y*) *Aitken* v. *Boullen*, 1908, S.C. 490. See p. 72.

General rule.

The rule is laid down that it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim of compensation, but not to a right to treat the whole contract as repudiated (§ 31 (2)).

It appears, therefore, that the mere failure to deliver, or mere failure to take delivery and pay for one instalment, does not give the other party the right to throw up the remainder of the contract. There must be more than this. The party in default must, by his words or actions, indicate that he does not intend to carry out the remaining part of the contract according to its terms. So where a party refused to pay for an instalment, except subject to deductions to which he was found not entitled, and which deductions would apply equally to the remaining instalments, the other party was found entitled to rescind the contract (*z*).

Again, in a continuing contract for a supply of goods to suit the buyer's requirements during a specified period, it was held that, if on one occasion the seller should tender goods inferior to contract quality, the purchaser would not in ordinary circumstances be justified in rescinding the whole contract, though he would be entitled to return the particular lot of goods which were objectionable. But if a seller systematically sends goods which are not conformable to contract, and the contract is for successive deliveries,

(*z*) *Turnbull* v. *M'Lean & Co.*, 1 R. 730; *West & Co.* v. *Robertson*, 10 S.L.R. 467; *Merry* v. *Stevenson*, 2 S.L.T. 489.

where such conduct is persisted in so as to make it evident that the seller does not intend to fulfil his contract, the purchaser may rescind the contract and refuse to take further deliveries (*a*).

And, lastly, in a case in the House of Lords it was said: "You must look at the actual circumstances of the case, in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part" (*b*).

In accordance with these principles a seller is not entitled to refuse to deliver an instalment because the previous instalment has not been paid for, unless the failure to pay for same amounts to a renunciation of the contract in the sense above explained, and he cannot plead that he has a lien on such instalment for the price of the previous one (*c*). If, however, the buyer is insolvent, the case is different as we have seen (*d*).

If buyer does not ask for delivery of an instalment.

Another question often arises in the working out of such contracts. Where the buyer does not ask for the delivery of the whole of any instalment at the time when it is due, can he thereafter, at any time, say, at the end of the contract, demand delivery of

(*a*) *Govan Rope Co.* v. *Weir*, 24 R. at p. 373.
(*b*) *Mersey, &c., Co.* v. *Naylor*, 9 A.C., *per* Lord Selborne, at p. 438.
(*c*) *Steinbeyer* v. *Atkinson*, 31 T.L.R. 110. (*d*) See p. 95.

the balance. This seems to depend upon the terms of the contract. A coal company contracted with coal merchants to supply 3000 tons of coal, to be delivered over the next four months in average or about equal monthly quantities, and in shipping lots of from 400 to 600 tons, due notice being given. In the first month the buyers were not in a position from want of a vessel to take delivery of any coal, and they asked for none and the sellers tendered none. In the second month the buyers asked for one shipment of 426 tons and got it. In the third month the buyers asked for the whole monthly quantity, which the sellers failed to deliver to the extent of 262 tons. In the fourth month there was delivery of the monthly quantity less 71 tons. There was thus delivery of 1594 tons during the period of the contract, as against the 3000 tons contracted for, and the buyers claimed damages at the end of the contract period for the non-delivery of the whole balance at the market price then ruling. They contended that under the contract the sellers were bound to deliver 3000 tons in all, and that what was not delivered in one month should have been delivered in another. The Court held this was not so, that each monthly delivery was separate and separable, although the rights and obligations of the parties arose out of one contract for 3000 tons of coal, and that it was the duty of the buyer to buy in against the sellers at the end of each month for the quantity short delivered during that month, if the short delivery was the fault of the sellers, and, therefore, that the amount of damages was to be calculated on the basis of the market price ruling at the end of each month

for the quantity so short delivered during that month. Applying these principles the Court held that there was no breach of contract by the sellers in the first two months, because they delivered all the coal that was asked for, but that there was such breach in the third and fourth months, and damages were due on the principle stated (*e*).

If no periods stipulated.

If, however, in such a contract there are no periods stipulated in which certain proportions of the total quantity of goods are to be delivered, the result is different. So where the contract was for the sale of a certain quantity of coal, shipment by steamers and sailers expected sailing March to December, it was held that the sellers could not maintain that they were bound to supply only a proportional quantity in each month, and that if the buyers did not demand that proportional quantity in any one month they were barred from claiming delivery of same in a succeeding month. The buyers were held entitled to demand any quantity they pleased at any time, subject only to this, that the amount demanded was reasonable, and if the sellers failed to deliver such quantity they were liable in damages (*ee*).

Delivery to a carrier.

Where in pursuance of a contract of sale the seller is authorised or required to send the goods to the buyer, delivery of goods to a carrier for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer (§ 32 (1)).

The case here contemplated is where the seller and buyer are in different towns or countries, and there

(*e*) *Ireland* v. *Merryton Coal Co.*, 21 R. 989; see also *Barr* v. *Waldie*, 21 R. 224; *Higgin* v. *Pumpherston Oil Co.*, 20 R. 532.

(*ee*) *Veit* v. *Ireland*, 33 S.L.R. 526.

is an express or implied stipulation in the contract that the seller shall send the goods to the buyer. In doing so the seller is acting as agent for the buyer, and the case is broadly distinguished from the cases which we have already considered, where, for example, nothing is expressed as to the sending of the goods, and it is for the buyer to send for them, or where the seller undertakes to deliver the goods at a certain place. In the case under consideration it is the duty of the seller to hand the goods to the carrier. When he has done that he has performed his contract, and the delivery, that is the transfer of possession of the goods to the buyer, is deemed to be complete. Should the goods be damaged while in the carrier's hands it will be for the buyer, not the seller, to claim against him.

It is, of course, otherwise where by the contract the seller undertakes to deliver the goods at a certain place. Until the goods arrive at that place no property in the goods passes to the buyer, still less has he the possession. The risk remains with the seller, and if the goods are damaged during the transit, so as to be no longer conform to contract at the end of it, the buyer may reject them (*f*). This, however, must be taken reasonably. If the goods must necessarily deteriorate in the course of transit, such deterioration is at the risk of the buyer, not of the seller (§ 33). So also the case is different, as we have seen, where the seller in delivering the goods to the carrier reserves his sigh tof disposal of the goods (*g*).

(*f*) *Badische, &c.*, v. *Basle Chemical Works*, 1898, A.C. 200.
(*g*) See p. 61.

Where the seller is acting as agent for the buyer in sending the goods, as above explained he must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages (§ 32 (2)). So where the seller neglects to make the declaration as to the value of goods sent, required by the Carrier's Act, 1830, or by the Merchant Shipping Act, 1894, in the case of a carrier by sea, and the buyer in consequence is unable to claim against the carrier, the seller has not made a delivery of the goods, not having put them in such a course of conveyance as that in case of a loss the buyer may have his indemnity against the carrier (*h*).

Where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit (§ 32 (3)). Such notice apparently must be given before the sea transit begins. If, however, the buyer has already possession of all the information necessary to enable him to effect insurance, there is, of course, no duty on the seller to do anything.

(*h*) *Clarke* v. *Hutchins*, 14 East 475; *Buckman* v. *Levi*, 3 Camp. 414; *Cothay* v. *Tute*, 3 Camp. 129.

This subsection has been held, although with some difference of opinion on the bench, to apply to a contract for the sale of goods f.o.b (*i*). In the case cited it was also held, again with a difference of opinion, that in the circumstances the buyers had all information necessary to enable them to insure, and that, therefore, there was no obligation on the sellers to give notice to the buyers of the shipment on a particular ship.

The subsection clearly does not apply to a c.i.f. contract, because the contract provides for all the insurance which is contemplated or usual, and the seller is to effect it (*j*).

(*i*) *Wimble* v. *Rosenberg*, 1913, 3 K.B. 743; see also *Northern, &c., Co.* v. *Bett*, 1917, 33 T.L.R. 516.
(*j*) *Law* v. *British, &c., Co.*, 1916, 2 K.B. 605.

CHAPTER VII.

Acceptance of the Goods and Payment of the Price.

When the seller has fulfilled the duty incumbent on him under the contract to deliver the goods, it becomes the duty of the buyer to accept and pay for them in terms of the contract (§ 27). Acceptance means the taking of the goods by the buyer with the intention of becoming owner. Buyer's duty to accept.

When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. This is without prejudice to the rights of the seller, where the buyer's refusal to take delivery amounts to a repudiation of the contract (§ 37).

If the buyer has not previously examined the goods, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them, for the purpose of ascertaining whether they are in conformity with the contract, and the seller must give him such an opportunity (§ 34). A tender of goods does not mean a delivery or offer of packages Buyer must have opportunity to examine.

containing them, but an offer of those packages under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained. So he is not bound to accept goods tendered to him in closed casks which he is not allowed to open (*a*). And if the goods have been left in the custody of the seller after the sale, the buyer may be entitled to make a second examination to see if they have been properly attended to before he accepts delivery (*b*).

We have seen that in certain circumstances delivery of the goods by the seller to a carrier, for the purpose of transmission to the buyer, is deemed to be delivery of the goods to the buyer. In such a case the receipt of the goods by the carrier, however, is in no sense acceptance of the goods by the buyer. The carrier is not authorised, nor is he qualified, to examine and accept the goods as conform to contract. That must be done subsequently by the buyer himself.

When buyer is deemed to have accepted.

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them (§ 35).

Consequences of acceptance.

The consequence of acceptance of the goods is that

(*a*) *Isherwood* v. *Whitmore*, 11 M. & W.
(*b*) *Chalmers* v. *Paterson*, 24 R. 1020.

the buyer cannot thereafter reject them. And the buyer is bound to use the utmost diligence in making up his mind whether he will accept or reject. He cannot keep the matter in suspense until, possibly, the state of the market may change, and this rule is strictly enforced. The time allowed him varies according to the circumstances and the nature of the goods. In ordinary commercial transactions it is the duty of the buyer to examine the goods on delivery, and to reject them immediately if he proposes to take that course. If he delays he must keep the goods (*c*). No greater latitude of time will be allowed than what is reasonably necessary to enable the buyer to decide (*d*).

Delay in acceptance.

In the case, however, of goods where the defect is latent, and does not show itself until after the lapse of some time after delivery, the rejection is in time if made as soon as the defect shows itself. Where the contract was to supply a large number of lithographed plates, the buyers examined one or two packages when delivered and observed nothing wrong with them. About two weeks afterwards it was found that a large number of the plates were sticking together and unsaleable. The buyers then intimated rejection, and were found entitled to reject (*e*). The same thing often occurs in sales of machinery. You cannot tell whether it is sufficient till it has been tried, and that can be done only on the premises where it is intended to work it. Accordingly, it often happens that after machinery has been erected it goes well

If defects are latent.

(*c*) *Carter & Co.* v. *Campbell*, 12 R. 1075.
(*d*) *Wallace* v. *Robinson*, 22 S.L.R. 830; *Hyslop* v. *Shirlaw*, 7 F. 875.
(*e*) *M'Caw* v. *Maclaren*, 22 R. 437.

for a time, but afterwards shows defects. In such cases the seller usually endeavours to remedy the defect, and his efforts often continue for months with the assent of the buyer. If in the end these fail the buyer is entitled to reject. A seller cannot, in such cases, say that the rejection is not in time (*f*).

Again, in the case of seeds the defect is often latent, and not discoverable until the crop comes up. In such cases, of course, the buyer cannot reject the goods, but he will be entitled to the damages directly and in the ordinary course following from the breach of contract (*g*).

Goods to be sent abroad

When goods are purchased in order to be sent abroad, questions sometimes arise as to the time when, and the place where, the buyer must inspect the goods, whether in this country or at the place of ultimate destination. This depends on the terms of the contract, and upon whether the buyer was in a position to make an examination in this country. Where pipes had been ordered on account of a customer in Buenos Ayres, and the seller knew generally that they were going abroad, they were not examined at the shipping port here, although that could easily have been done. It was held that a rejection at Buenos Ayres came too late (*h*). On the other hand where coals were ordered according to sample which, to the knowledge of the sellers, were to be sent to buyers

(*f*) *Pearce* v. *Irons*, 7 M. 571; *M'Carter* v. *Stewart*, 4 R. 890; *Fleming & Co.* v. *Airdrie Iron Co.*, 9 R. 473; *Morrison* v. *Clarkson*, 25 R. 427; *Aird* v. *Pullen*, 7 F. 258; *Munro* v. *Bennett*, 1911, S.C. 337.

(*g*) *Wilson* v. *Carmichael & Sons*, 21 R. 732.

(*h*) *Pirie & Co.* v. *Smith & Co.*, 22 R. 699; *Perkins* v. *Bell*, 1893, 1 Q.B. 193; *Strachan* v. *Marshall*, 2 S.L.T. 108.

abroad to whom the sample had been sent, it was held that rejection by the buyers abroad was in time. The buyers in this country had not the sample and could not, therefore, compare the cargo with it here. It was at the port of destination only that it could be ascertained whether the cargo was or was not conform to contract, and there was no want of prompt rejection there (*i*).

It thus appears that if the buyer after the lapse of a reasonable time retains the goods without intimating to the seller that he has rejected them, he will be deemed to have accepted them. The same result follows when, after the goods have been delivered to him, he does any act in relation to them which only an owner is entitled to do. So if he breaks bulk beyond what is necessary to enable him to examine the goods. This is a question of fact in each case (*j*). So when the buyer after he had ascertained that goods were not according to sample, sold them in his own name, it was held that by so doing he had accepted them and was barred from objecting to their quality (*k*.) Even offering the goods for sale by auction after the defect is discovered, although no sale results, has the same effect (*l*).

Meaning of acceptance in England.

What we have been considering is acceptance in performance of the contract. In England the word has also a technical meaning when used in connection with the formation of the contract. There is accept-

(*i*) *Magistrates of Glasgow* v. *Ireland & Son*, 22 R. 818.
(*j*) *Wallace* v. *Robinson*, 22 S.L.R. 830; *Mechan* v. *Bow*, 1910, S.C. 758.
(*k*) *Chapman* v. *Morton*, 11 M. & W. 534.
(*l*) *Parker* v. *Palmer*, 4 B. & Ald. 387; *Hunt* v. *Barry*, 13 S.L.T. 34.

ance of goods within the meaning of the Act, when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in the performance of the contract or not (§ 4 (3)) (*m*).

Special stipulations as to acceptance.

In order to avoid the expense and loss inevitable where goods are rejected, it is often specially stipulated that, should the quality of the goods delivered prove inferior to sample, they shall nevertheless be accepted, and an allowance will be made, or should any dispute arise under the stipulations of the contract, the buyers are not to reject any of the goods, but the dispute is to be referred to arbitration or similar provisions. Such provisions will have effect. But they do not apply where the goods tendered are different in description from what was brought. They refer only to inferiority in quality, and do not operate so as to force the buyer to take goods which are not commercially within the meaning of the contract (*n*).

Goods may be rejected although the property has passed.

The fact that the property in goods sold has passed to the buyer does not prevent the latter from rejecting them as disconform to contract if he has not accepted them in the sense we have considered. We have seen an application of this principle where goods are delivered to a carrier for transmission to a buyer. The question may also arise in contracts for the building of a ship, where the property in the unfinished ship passes on the payment of successive instalments of the price. If the ship when completed is not conform to contract it may be rejected. If she is built

(*m*) See Benjamin, p. 230.

(*n*) *Azemar* v. *Casella*, L.R. 2 C.P. 677; *Vigers Bros.* v. *Sanderson Bros.*, 1901, 1 K.B. 608.

under the inspection of the buyer it may well be that, if he pays an instalment without objecting to the work so far as completed, he will be barred from subsequently objecting to defects which are then apparent. But if he does object and the work goes on, he will be entitled to reject the ship when completed and get back the money paid, if the defects have not been remedied (*o*).

Goods rejected need not be returned.

Where goods are delivered to the buyer and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to him that he refuses to accept them (§ 36). In such a case the property in the goods remains with the seller, and they are at his risk. The buyer may place the goods in neutral custody, or he may keep them in his own premises in which case he becomes custodier of the goods for the seller, and is bound to take as good care of them as a prudent man takes of his own goods. For this he will be entitled to make a reasonable charge. He is bound to redeliver the goods to the seller on demand, and is not entitled to retain them until the seller agrees to send other goods in their place. If he does, he will be held to have accepted the goods and will be liable for the price (*p*).

Payment of the price.

It is the duty of the buyer to pay for the goods in accordance with the terms of the contract of sale (§ 27). These terms may be payment in cash at once, or payment in cash at a deferred period of credit, or payment by immediate acceptance of a bill of

(*o*) *Nelson* v. *Chalmers & Co.*, 1913, S.C. 441.
(*p*) *Jardine* v. *Pendreigh*, 6 S.L.R. 272.

exchange of a certain currency. The terms may be expressly stipulated in the contract, or they may be implied from the custom of trade or the course of dealing of the parties.

If the property in the goods has passed to the buyer, he must pay the price even if they have perished in the hands of the seller, provided this has not happened through the fault of the latter. They are at the risk of the buyer from the moment when the property passed.

The buyer must tender payment at the time when it is due without waiting for a demand from the seller, failing which he is liable to an action by the seller. So in a sale for cash he must tender the price at once.

Legal tender. Formerly gold coin was the only legal tender, but by the Currency and Bank Notes Act, 1914, Treasury Notes for one pound and ten shillings are made legal tender in the United Kingdom for the payment of any amount, and in Scotland and Ireland the bank notes issued by a bank of issue in those countries are put in the same category.

Place of payment. Payment must be made at any place appointed. If no place be appointed, payment must be made to the seller wherever he may happen to be.

Mode of payment. Payment must be made in the way requested by the seller, either expressly or by implication (*q*). If money is to be sent by post and it is lost or stolen in transmission, the buyer is discharged if he has followed the usual course in such cases. If he has not done so, for example, if he has enclosed a number of bank notes in a letter, which is after-

(*q*) *Norman* v. *Ricketts*, 3 T.L.R. 182.

wards stolen in transmission, the loss will fall upon him (*r*).

Except in the case of ready-money transactions, or where the amount is less than £8, 6s. 8d., payment of the price can, in Scotland, only be proved by writing (*s*). In England parole evidence is sufficient. Proof of payment.

If there is a dispute as to the amount due, a tender of the amount admitted by the buyer as in full of all the seller's claims is not a good tender. But if the seller retains the amount so sent as to account of his claims, the buyer is discharged. The seller cannot retain it except on the terms on which it is sent (*t*). But a buyer may safely tender the whole amount claimed by the seller and which he disputes, if he does so under protest that it is not due, and he will be entitled to recover back the amount which he can establish has been overpaid (*u*). What is a good tender.

Unless a different intention appears from the terms of the contract, stipulations as to the time of payment are not deemed to be of the essence of a contract of sale (§ 10), that is to say, the mere failure of the buyer to pay the price at the stipulated time does not entitle the seller at once to rescind the contract and dispose of the goods elsewhere. Provided the buyer is ready and willing to pay the price within a reasonable time after the due date the seller must deliver the goods, failing which, he will be liable to the buyer in damages (*v*). Time of payment.

In a contract where nothing is said about the time Sales for ready money.

(*r*) *Mitchell Henry* v. *Norwich, &c., Society*, 1918, 2 K.B. 67.
(*s*) *Shaw* v. *Wright*, 5 R. 245.
(*t*) *Semple* v. *Wilson*, 16 R. 790; *Caine* v. *Coulson*, 1 H. & C. 764.
(*u*) *Greenwood* v. *Sutcliffe*, 1892, 1 Ch. 1.
(*v*) *Martindale* v. *Smith*, 1 Q.B. 389; *Linn* v. *Shields*, 2 M. 88.

for payment of the price, the law reads it as a ready-money bargain, unless the custom of the trade or the previous course of dealing of the parties fixes otherwise. A ready-money bargain means one in which the obligations of payment and of delivery are reciprocal. The seller cannot demand the price of the goods without offering the purchaser delivery, nor can the purchaser demand delivery without offering payment of the price (*w*).

Payment by bill.

If by the terms of the contract payment is to be made by the buyer's acceptance of a bill, such an acceptance is a conditional payment. If the buyer fails to pay the bill at maturity, the seller's claim for the price revives (*x*). But if the seller has endorsed the bill away, he cannot claim against the buyer until he gets the bill back again into his hands. If this were not so, the buyer might be called upon to pay twice, once to the seller and again to the holder of the bill (*y*). If, however, the buyer pays for the goods by endorsing to the seller the acceptance of a third party, then, if the seller or any subsequent endorsee fails to take the steps necessary to preserve the buyer's recourse, on the dishonour of the bill the buyer will be discharged not only of his obligations under the bill, but also of his liability for the price of the goods (*z*).

If it can be shown that a bill has been taken by the seller with the intention that it should operate as immediate payment, then the buyer is discharged of his liability to pay the price, even if the bill be

(*w*) *Hall* v. *Scott*, 22 D. 413.
(*x*) See p. 144.
(*y*) *Re A Debtor*, 1908, 1 K.B. 344; *Davis* v. *Reilly*, 1893, 1 Q.B. 1.
(*z*) See Chalmers on *Bills of Exchange*, p. 134.; *Smith* v. *Mercer*, L.R. 3 Ex. 51.

ultimately dishonoured. Such an intention may appear where the buyer offers to pay in cash and the seller takes a negotiable security in preference. This is held to be an absolute payment (*a*). But if the seller merely prefers a cheque to a payment in cash, no such intention is presumed. Where it was stipulated in a contract of sale that payment should be made by an approved acceptance, this was held to be merely conditional payment, and liability for the price revived on the bill being dishonoured (*b*). An "approved acceptance." means an acceptance to which no reasonable exception can be taken, but that does not mean that where such is stipulated for, and the seller takes without objections a bill from the buyer, this amounts to full payment and discharge of the price. It is merely conditional payment as in the ordinary case.

Approved acceptance.

Where a cheque given by the buyer in payment of the price is not presented by the seller or his endorsee within a reasonable time and the buyer suffers actual damage through the delay, he is discharged to the extent of such damage (*c*).

Payment by cheque.

Where the price is payable in instalments and overpayments are made in error in the earlier instalments, credit must be allowed for such repayments in the subsequent accounting (*d*).

Overpayment.

(*a*) *Guardians of Lichfield* v. *Green*, 1 H. & N. 884.; *Cowasjee* v. *Thomson*, 5 Moo. P.C. 165.
(*b*) *M'Dowall & Neilson's Trustee* v. *Snowball & Co. Ltd.*,7 F. 35.
(*c*) Bills of Exchange Act, 1882, § 74.
(*d*) *Baird's Trs.* v. *Baird*, 4 R. 1005.

CHAPTER VIII.

Actions for Breach of the Contract.

When either the buyer or seller of goods fails to implement his contract the other party has a right of action against him (§ 57).

I.—Rights and Remedies of the Seller.

The remedies of the seller vary according to whether the property in the goods has or has not passed to the buyer.

Where the property has passed.

Where the property has passed and the buyer wrongfully neglects or refuses to pay according to the terms of the contract, the seller may maintain an action against him for the price, that is to say, the seller may insist on the contract being carried out according to its terms (§ 49 (1)). If the goods have been delivered to the buyer the seller's right to the price is, of course, clear. If they have not been delivered the seller may tender delivery and demand the price. And, in addition, the seller may in Scotland recover the interest on the price from the date of tender of the goods, or from the date on which the price was payable as the case may be (§ 49 (3)). Interest is in Scotland due in all cases where the use of money is retained, unless from the circumstances of the case there is ground in equity to hold that interest

Where the property has passed the seller may claim the price.

Interest on the price.

was not meant to be demanded (*a*). It is otherwise in England (*b*).

But the seller has an alternative remedy. Instead of suing for the price he may maintain an action against the buyer for damages. The measure of damages is the estimated loss, directly and actually resuling in the ordinary course of events from the buyer's breach of contract. Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept (§ 50).

Alternatively the seller may claim damages.

"Available market," in this connection, means some place where the seller can sell his goods just as he can sell corn on the Exchange or cotton at Liverpool, that is to say, where there is a fair market in which he can find a purchaser, either by himself or through some agent at some particular place. If there is no such market the seller is entitled to the full amount of the damage which he has really sustained by the breach of the contract. The buyer is not to be exposed to additional cost by reason of the seller not doing what he ought to have done as a reasonable man, and, on the other hand, the seller is not under any obligation to do anything otherwise than in the ordinary course of business, and what he would have done in his own interest in a case where he

Available market.

(*a*) Bell's *Com.* I. 692.
(*b*) Benjamin, p. 947.

had no claim upon anybody (*c*). For example, where there was a contract for certain machinery and part of it was completed and part was not, and the buyers failed to take delivery and pay for any of the goods, and there was no available market for the resale of the goods, the sellers were held entitled to the whole of the profit they would have made if the contract had been carried out. As to the machinery which was completed, the sellers resold that to another party at a small loss as compared with the contract price, but it was held that their claim was not to be confined to that loss. There was nothing to show that they would not have been able to carry out both contracts, and they were entitled to their profit upon both. Similarly as to the unfinished or unmade machinery, there was no evidence to show that if the works had been employed to execute the order under the contract they would have been unable to execute other orders which they had received. Under these circumstances no credit needed to be given in respect of the employment of the works upon the other operations (*d*).

Where the property has not passed.

Where the property in the goods has not passed to the buyer, the seller cannot in general sue the buyer for the price. The goods remain his own, and he can take them into the market and obtain the current price for them. His remedy against the buyer is, therefore, limited to a claim for damages (*e*) calculated on the above basis.

(*c*) *Dunkirk Colliery Co.* v. *Lever*, 9 Ch. D. at p. 25; but see *Marshall* v. *Nicoll*, 1919, S.C. 244.

(*d*) *In re Vic Mill Ltd.*, 1913, 1 Ch. 465; *Hill* v. *Showell*, 87 L.J. (K.B.) 593.

(*e*) *Barrow* v. *Arnaud*, 8 Q.B. 604.

There is one case, however, in which the seller even in this case may sue for the price. Where under a contract of sale the price is payable on a day certain, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract (§ 49, 2). The reason simply is that, where there is an express agreement that the price shall be payable on a day, certain, irrespective of delivery, the seller is entitled to implement of that agreement (*f*).

Refusal to implement before implement is due.

A party to a contract of sale may before the time arrives for the execution of the contract, intimate to the other that he does not propose to implement it. The other party, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance, but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which may justify him in declining to complete it. On the other hand, he may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in

(*f*) See *Stein* v. *County, &c., Co.*, 86 L.J. K.B. 448.

such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss (*g*).

Where implement repudiated seller need not tender the goods.

Where there is a contract for the manufacturing and supply of goods, and the buyer intimates that he does not propose to accept them, the seller, without manufacturing and tendering the goods, may maintain an action against the buyer for breach of contract. The seller must be ready and willing to deliver the goods, but this only means that the non-completion of the contract was not the fault of the seller, and that he was disposed and able to complete it, if it had not been renounced by the buyer (*h*).

II.—Rights and Remedies of the buyer.

Claims by the buyer against the seller for breach of contract may arise, either where the seller fails to deliver the goods sold, or where he delivers goods disconform to contract.

Where seller refuses to deliver the goods.

Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract

(*g*) *Frost* v. *Knight*, L.R. 7 Ex, per Cockburn, C.J. at p. 112.
(*h*) *Cort* v. *Ambergate Rly. Co.*, 17 Q.B. 127.

price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver (§ 51) The question is, what would the buyer have had to pay in order to get the goods (*i*). He need not actually buy other goods to take the place of those which the seller has failed to deliver, but his damages are measured as if he had done so.

The ground of this rule is that the goods would be worth to him what they would fetch in the open market, and that if he wanted to get others in their stead, he could obtain them in that market at that price. The buyer, not having got his goods, should receive by way of damages enough to enable him to buy similar goods in the open market (*j*). On the other hand, the buyer has a duty to do what is within his power to lessen the loss to the seller by replacing the goods at the current price of the day, and his damages are calculated on that footing. But if the buyer cannot so supply himself because the goods cannot be obtained elsewhere, and the goods, to the knowledge of the seller, are bought for the purpose of reselling, the damages recoverable will be the commercial profit which the buyer would have made on reselling the goods in the ordinary course of business, if the seller had implemented his contract. This is a loss which the seller must have contemplated as likely to follow in the ordinary course of things from his failure to deliver the goods (*k*).

(*i*) *Marshall* v. *Nicol*, 1919, S.C. (H.L.) 129.
(*j*) *Wertheim* v. *Chicoutimi Co.*, 1911, A.C. at p. 307.
(*k*) *Duff* v. *Iron Buildings Co.*, 19 R. 199; *Millar* v. *Bellvale Chemical Co.*, 1 F. 297.

It has been held that the buyer is not bound to make extraordinary exertions to supply himself elsewhere by buying small quantities wherever he can find them, when there is no regular market open to him (*l*). But the buyer must take all reasonable steps to mitigate the loss consequent on the breach of contract, and he will be debarred from claiming any part of the damage which is due to his neglect to take such steps (*m*). What is reasonable for a person to do in mitigation of his damages, cannot be a question of law, and must be one of fact in the circumstances of each particular case. So if the seller, after refusing to deliver the goods at the price contracted for, offers them at a higher price, it may be the duty of the buyer to accept the offer, and confine his claim of damages to the difference between these terms and those contained in the contract (*n*).

General and special damages.

The damages above referred to are what in England are called general damages, and in most cases are all that may be recovered by the buyer.

But damages which result, not from the ordinary course of events, but from the particular circumstances existing in the case, may in some cases be recovered (§ 54).

The right to recover such damages, which are called special damages, is founded on the principle that where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under

(*l*) *Gunter* v. *Lauritzen*, 31 S.L.R. 359.
(*m*) *British, &c., Co.* v. *Underground, &c., Ltd.*, 1912, A.C. 673.
(*n*) *Payzu* v. *Saunders*, 1919, 2 K.B. 581.

those special circumstances, then such special damage must be supposed to have been contemplated by the parties to the original contract, and is recoverable (*o*). But this statement of the law must be modified to the effect that mere communication of the special circumstances will not have this effect, unless there be some proof that the seller assented to become responsible for these further consequences when he entered into the contract (*p*).

So if a party contracts to supply a threshing machine on a certain date, which he knows is wanted for threshing wheat in the field, and fails to do so, and the wheat has, therefore, to be carried home and stacked, he is liable for the damage to the wheat thence arising. He knows at the time he enters into the contract the probable consequences of his failure to carry it out, and it may fairly be inferred that he has assented to becoming responsible for them (*q*).

In the case where the buyer has resold the goods to a third party, and the original seller has failed to deliver the goods, if there is no market where the buyer can obtain the goods, the buyer will be unable to carry out his sub-sale, and he will lose the profit he would have made on it. The question will then arise, can he recover from the seller this profit, and also the damages he may have had to pay to the sub-buyer from his inability to carry out the sub-sale. This will depend upon the principles above stated. If the seller knew nothing of the sub-sale he will not be liable to reimburse the buyer for the profit he has

(*o*) *Hadley* v. *Baxendale*, 9 Ex. at p. 354.
(*p*) *British Columbia Saw Mill Co.* v. *Nettleship*, L.R. 3 C.P. 499.
(*q*) *Smeed* v. *Foord*, 1 E. & E. 602.

lost and the damages he has incurred. He will be liable only for general damages as above explained. In assessing these, however, the price that the buyer would have received from the sub-buyer, is some evidence of the value of the goods which will be the basis of the assessment. If, on the other hand, the original seller knew that the goods bought from him were required to fulfil a particular contract which the buyer has made with a third party, he will be liable for the loss of profit which the buyer sustains through failure to carry out that sub-contract. And he will be further liable to reimburse the buyer for all the consequences of such failure if the sub-contract was fully made known to him in all its terms, because in that case it may be inferred that he so contracted with the original buyer. But he will not be liable for consequences which were not made known to him (*r*).

If the buyer is unable to prove that he has suffered any damage through the seller's breach of contract, in respect that he has been able to supply himself elsewhere with the goods at the same price, he is still entitled to nominal damages (*s*). And if, though no specific damage has been proved, the party has been put to serious inconvenience and trouble through the breach of the contract, substantial damages will be given (*t*).

Liquidated damages.

In order to avoid the difficulty in fixing the measure

(*r*) *Grebert* v. *Nugent*, 15 Q.B.D. 85; *Horne* v. *Midland Rly. Co.*, L.R. 8 C.P. 131; *G.W. Rly. Co.* v. *Redmayne*, L.R. 1 C.P. 329; *Williams* v. *Reynolds*, 6 B. & S. at p. 505; *Williams* v. *Agius*, 1914, A.C. 510; *Slater* v. *Hoyle*, 1920, 2 K.B. 11.

(*s*) *Valpy* v. *Oakley*, 16 Q.B. 941; *Griffiths* v. *Perry*, 1 E. & E. 680.

(*t*) *Webster & Co.* v. *Cramond Iron Company*, 2 R. 752.

of damages payable on breach of a contract, the parties often fix a sum as liquidated damages to be paid in that event. If this be done, effect will be given to it, and no proof as to the amount of the loss actually sustained is either required or relevant. If, however, it can be shown that the amount fixed is exorbitant and unreasonable, the Court may modify it (*u*).

Penalty.

Another course often followed is to fix a penalty to be paid by the party failing to implement the contract to the other party, over and above performance. The effect of such a stipulation as construed by the Courts is curious. It is held that it does not assess the damage, and that the wronged party must prove the amount of loss he has sustained, and is entitled to that and nothing more. But, on the other hand, it is held that the wronged party's claim is not limited to the amount of the penalty. He is entitled to sue, not for the penalty, but for the whole amount of the loss sustained by him and may recover that amount although it may greatly exceed the amount of the penalty (*v*). If, therefore, a penalty neither assesses nor limits the amount recoverable, the stipulation for a penalty seems useless.

It obviously is of the first importance to fix whether what is stipulated is really liquidated damages or penalty, and this is frequently difficult, because it is held that the mere use of one expression or the other is not conclusive. The whole contract must be considered in order to ascertain the true intention of the parties (*w*). The question to be determined is whether

(*u*) *Forrest* v. *Henderson*, 8 M. 187.
(*v*) *Dingwall* v. *Burnett*, 1912, S.C. 1097.
(*w*) *Forrest* v. *Henderson*, 8 M. 187.

the stipulation amounts to a pre-estimation and agreement as to the loss which will be sustained in consequence of a breach of the contract, or whether it is simply a penalty to be held over the other party *in terrorem*.

In many cases it is practically impossible to prove in pounds, shillings, and pence, the amount of loss sustained by an injured party. In others, we find that the sum payable is proportional to the amount of non-performance of the agreement. In such cases it may be inferred *prima facie* that the parties intended that the amount stipulated should be liquidated damages and not penalty, whichever term they may have used (*x*). But if the sum stated is so exorbitant and extravagant that it could not have been regarded as damages for any possible breach which was in the contemplation of the parties, the inference will be that merely penalty was meant. So also where the payment of a smaller sum is secured by a larger, the latter must be held to be a penalty

Where it is doubtful from the terms of the contract whether the parties meant that the sum should be a penalty or liquidated damages, the inclination of the Court will be to view it as a penalty. The effect of this, as already said, is to leave the injured party to prove the actual amount of his loss, whatever that may amount to. (*y*)

Deposit.

Where in a contract of sale the buyer deposits a sum of money which it is stipulated is to be forfeited if he fails to carry out the contract, the seller is entitled

(*x*) *Clydebank Co.* v. *Castaneda*, 7 F. (H.L.) 77; *Webster* v. *Bosanquet*, 1912, A.C. 394; *Cameron* v. *Cameron*, 1919, S.C. 627.
(*y*) *Crisdec* v. *Bolton*, 3 C. & P. 243.

to the money without proof of loss. The contract in short must be carried out according to its terms (*z*).

Where there are stipulations in a contract of varying importance, so that the breach of some may involve serious consequences, while the breach of others may be comparatively unimportant, then if one large sum is stipulated to be paid on breach of performance, generally the probability is that the parties intended this sum to be a penalty, and that the amount of the damages is to be settled by proof. But in all cases the intention of the parties must be gathered from the whole terms of the contract, interpreted in the light of the circumstances of the case (*a*).

The buyer, instead of claiming damages from the seller where the latter neglects or refuses to deliver the goods, has in some cases an alternative right. He may apply to the Court for an order upon the seller to deliver the goods in terms of the contract.

Specific implement.

In any action for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically without giving the defendant the option of returning the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise as to the Court may seem just (§ 52).

(*z*) *Lord Elphinstone* v. *Monkland Co.*, 11 A.C. 332; *Roberts* v. *Salvesen*, 1918, S.C. 794.

(*a*) *Wallis* v. *Smith*, 21 Ch. D. at p. 258; *Commercial Bank* v. *Beal*, 18 R. 80; *Pye* v. *British, &c., Syndicate*, 1906, 1 K.B. 425; *Dunlop Co.* v. *New Garage Co.*, 1915, A.C. 79; *Ford Co.* v. *Armstrong*, 31 T.L.R. 267.

The section of the Act quoted states the law of England on the subject. But the Section further provides that it shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

By the law of Scotland the right of the buyer to specific implement of a contract of sale of specific goods is absolute, subject to what is to be said immediately. The breach of a contract of sale of a specific subject generally gives the party aggrieved the legal right to sue for implement, and, although he may elect to resort to the alternative of an action of damages, he cannot be compelled to do so, unless implement is shown to be impossible (*b*). If, however, it can be shown that it would be inconvenient and unjust to the seller to enforce specific performance of the contract, the Court has power to restrict the buyer's claim to one of damages (*c*).

Where seller delivers goods not conform to contract.

We have considered the case where the seller has failed to deliver the goods. We have now to consider the case where he has delivered goods, but the goods are not conform to contract. In such a case in Scotland the buyer may either, within a reasonable time after delivery, reject the goods and treat the contract as repudiated, or retain the goods, and treat the failure to perform such material part of the contract as a breach, which may give rise to a claim for compensation or damages (§ 11 (2)) (*d*).

Buyer may reject the goods.

The buyer has thus two alternative remedies.

(*b*) *Stewart* v. *Kennedy*, 17 R. (H.L.) at p. 10; *Sutherland* v. *Montrose, &c., Co.*, 22 D. 665.
(*c*) *Aurdal* v. *Compania, &c.*, 1916, S.C. 882.
(*d*) As to the law in England, see p. 67.

But it is important to notice that when the buyer has made his election between the alternatives, he must act accordingly, and do nothing inconsistent with the position he has taken up. If he has decided to reject the goods, that implies that the goods remain the property of the seller, and the buyer has no right to use them as his own.

But if buyer rejects he must act accordingly.

In one case (*e*) a dynamo was sold according to specification, to be erected by the sellers on the buyer's premises. It failed to do the work required by the contract, and the sellers tried, during a period of seven months, to remedy the defects, but without success. The buyers then intimated that if the sellers could not make the machine work according to contract they would have to remove it. The sellers did not remove it at once, and the buyers continued to use it for an additional three months. It was held that having so used it they were barred from rejecting it, and further that they were not entitled to fall back upon a claim of damages after having elected to reject, but must pay the full price. The decision was one reversing the judgment of Lord Low in the Outer House, and Lord Kinnear, in the Inner House, strongly dissented from the second part of the judgment, holding, as he did, that the buyer was still entitled to claim damages.

In a subsequent case (*f*) the buyer rejected goods as disconform to contract, but insisted on retaining them in security of a claim of damages for breach of the contract. This was held to be an illegitimate

(*e*) *Electric Construction Co.* v. *Hurry*, 24 R. 312.
(*f*) *Lupton* v. *Schulze & Co.*, 2 F. 1118.

method of putting pressure on the seller, and that having retained the goods he was liable in the whole contract price without deduction. The case was somewhat special, and Lord Moncrieff reserved his opinion as to whether in all cases the buyer would be so barred from claiming damages.

In a third case (*g*) in circumstances similar to those in the first case cited, the decision in that case was followed, Lord Kyllachy, however, intimating doubt. The law, therefore, must be taken as settled, although with serious dissent and doubt of some of the judges, that a buyer acting in the way indicated, loses his right to both the alternatives provided by the Act, and must pay the full contract price.

Seller may tender other goods.

If goods are properly rejected by the buyer, the seller is entitled within the time allowed by the contract to tender other goods, which are conform to the contract, and the buyer must accept them (*h*).

Alternatively the buyer may retain the goods and claim damages.

If the buyer elects to retain the goods, and to claim damages, he may set up against the seller such damages in diminution or extinction of the price, or maintain an action against the seller for the damages (§ 53 (1)).

Measure of damages.

The measure of damages in such a case is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach (§ 53 (2)), and in the case of a breach of a warranty of quality, such loss is *prima facie* the difference between the actual value of the goods at the time of delivery to the buyer, and the value they would

(*g*) *Croom & Arthur* v. *Stewart & Co.* 7 F. 563.
(*h*) *Borrowman* v. *Free*, 4 Q.B.D. 500.

have had if they had answered to the warranty (§ 53 (3)). The result in this case will be that the buyer will retain the goods on paying their actual value at the time of delivery. But the buyer's remedy is not limited to this if he has suffered special damages. These are recoverable from the seller according to the principles above considered (§ 54) (*i*), and he will be entitled to recover them by separate action if they exceed the amount of the price.

The way in which the above principles are applied, is illustrated by a case (*j*) where sellers contracted to sell by description sulphuric acid commercially free from arsenic. The purpose for which the acid was bought, was not made known to the sellers. The goods were paid for and delivered, and the buyers used the acid in the manufacture of brewing sugar in the shape of invert and glucose, which they sold to brewers, who used it in the brewing of beer. The acid, in fact, contained arsenic, and the beer was rendered poisonous. The buyers then claimed damages from the sellers under the following heads:—(1) the price paid for the acid, which was worthless to the buyers; (2) the value of material used for the purpose of making glucose and invert, which was spoilt by being mixed with the acid; (3) compensation for the loss of the goodwill of the buyers' business; (4) damages which the buyers were liable to pay to brewers who had been supplied with glucose and invert made out of the acid.

The buyers were held entitled to recover under

(*i*) See p. 130.
(*j*) *Bostock* v. *Nicholson*, 1904, 1 K.B. 725.

head (1), because the acid was worthless to them, and they were entitled to set up the breach of warranty in extinction of the price. They were held also entitled to recover under head (2), because that was loss directly and naturally resulting in the ordinary course of events from the breach of warranty. The acid was applied by them to one of the ordinary purposes for which such acid is used. The buyers were held not entitled to recover under head (3), because that was held not to be a loss directly and naturally resulting in the ordinary course of events from the breach of warranty. It arose not directly from any act of the sellers, but arose from the act of the buyers in manufacturing glucose and invert by means of poisonous acid, and selling the glucose and invert so made as fit to be used in the brewing of beer. The purpose of the buyers so to use the acid was not made known to the sellers. (*k*) Lastly, the buyers were held not entitled to recover under head (4), because the contracts between the buyers and the brewers had not been made known to the sellers.

If the buyer has suffered damage which is of the nature of special damage, but which he is not entitled to recover in respect that it was not in the contemplation of the parties when the contract was entered into, the seller is not thereby relieved from all liability. He will be liable for the damage that would have arisen naturally, and in the usual course of events from his breach of contract (*l*).

If the seller supplies a machine which is not

(*k*) But see *Cointat* v. *Myham*, 1913, 2 K.B. 220; 1914, W. N. 49.
(*l*) *Cory* v. *Thames Ironworks Co.*, L.R. 3 Q.B. 181.

according to contract, and the buyer replaces it with another which is better than that which the seller contracted to furnish, the benefit thus obtained by the buyer must be taken into consideration in fixing the damages payable to the buyer (*m*).

Buyer may be required to consign price.

In Scotland, where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof (§ 59).

(*m*) *British, &c., Co.* v. *Underground, &c., Co.*, 1912, A.C. 673.

CHAPTER IX.

Rights of Unpaid Seller against the Goods.

We have considered the rights of the seller which can be enforced by a personal action against the buyer. But the unpaid seller has, in addition, rights against the goods themselves in security of the payment of the price.

Definition of unpaid seller.

In this part of the Act the term "seller" includes any person who is in the position of a seller. As we have seen a seller on shipping goods, for the purpose of transmission to the buyer, may, in order to retain the right of disposal of the goods, take a bill of lading, making them deliverable to himself or his assigns. He then transmits the bill of lading to his agent at the port of discharge, to be held by him until the buyer pays the price, or otherwise performs his part of the contract. Such agent has all the powers over the goods of an unpaid seller. If he had not his appointment would be useless. Again, a merchant in this country may instruct his agent abroad to purchase goods for him and send them here. In order to carry out the order the agent may have to buy the goods in his own name, or otherwise become responsible for the price. In thereafter sending the goods to his principal he is in the position, in a question between them, of an unpaid seller, and has

the rights of such. And there are other cases where a party, although really not a seller, is in the position of one.

A seller is deemed to be unpaid, within the meaning of the Act, when the whole of the price has not been paid or tendered, or when a bill of exchange or other negotiable instrument has been received as conditional payment and has been dishonoured (§ 38).

The rights which such an unpaid seller has against the goods are the following :—

Unpaid seller's lien.

1. A lien on the goods, or right to retain them for the price while he is in possession of them.

A lien is a right which one party has over the goods of another in security for the payment of a debt. Therefore, an unpaid seller's lien, strictly speaking, can only exist in cases where the property in the goods has passed to the buyer.

The lien covers only the price of the goods, and, as soon as that price is tendered by the buyer, the goods must be delivered. In the meantime the goods may have been lying in the seller's store owing to the buyer's failure to pay the price and take delivery, and the seller may be entitled to charge for their care and custody (§ 37), but apparently this is only a personal claim against the buyer, and the seller's lien does not extend to it (*a*).

The lien does not cover any other claim which the seller may have against the buyer, uncon-

(*a*) *Somes* v. *British, &c., Co.* 8 H.L.C. 338. This case, however, was decided before the passing of the Act. The provisions of Section 37 may make a difference now.

nected with the sale of the particular goods. This will be considered more fully presently, in dealing with the case where the property has not passed.

When it may be exercised.

The unpaid seller is entitled to exercise his lien in the following cases :—

(*a*) Where the goods have been sold without any stipulation as to credit. This, as we have seen, is held to be a sale for cash, and in such cases delivery of the goods and payment of the price are concurrent conditions (§ 28).

(*b*) Where the goods have been sold on credit, but the term of credit has expired while the goods still remain in the hands of the seller. In a sale on credit the seller waives his lien, and the buyer is entitled to demand immediate delivery. But if he leaves the goods in the seller's hands until the term of credit expires, the seller's lien revives (*b*).

(*c*) Where the buyer becomes insolvent, even if this occurs before the expiry of the period of credit (*c*).

After a sale has been made the buyer may employ the seller to keep the goods as custodier for him, but the seller will, nevertheless, be entitled to exercise any right of lien which he has as an unpaid seller (*d*).

Where an unpaid seller has made part delivery of the goods he may exercise his right of lien on the remainder, unless such part delivery has been made

(*b*) *Bunney* v. *Poyntz*, 4 B. and Ad. 568.
(*c*) See p. 94.
(*d*) *Miles* v. *Gorton*, 2 C. & M. 504 ; *Grice* v. *Richardson*, 3 A.C. 319.

under such circumstances as show an agreement to waive the lien (§ 42). But where the remainder of the goods continue to be in the possession of the seller, it is difficult to see how such an agreement can be implied.

Not affected by sub-sale.

The unpaid seller's right of lien is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto (§ 47). A sub-buyer, therefore, cannot get delivery until the price has been paid to the original seller, unless the seller has assented to the sub-sale. If, however, a document of title to the goods has been transferred to the buyer, and again transferred by him to the sub-buyer, the effect is different, as will presently be noted.

Unless sub-sale assented to.

But the assent which affects the unpaid seller's right of lien, must be such an assent as in the circumstances shows that the seller intends to renounce his rights against the goods. It is not enough to show that a sub-contract has been brought to his notice, and that he has assented to it merely in the sense of acknowledging the receipt of the information. His assent to the sub-contract in that sense, would simply mean that he acknowledged the right of the purchaser under the sub-contract to have the goods, subject to his own paramount right under the contract with his original purchaser to hold the goods until he is paid the purchase money. The assent contemplated under the section means something more than this. It means an assent given in such circumstances as show that the unpaid seller intends that the sub-contract shall be carried out, irrespective of the terms of the original

contract (*e*). So merely honouring delivery orders to deliver portions of a quantity of goods sold, was held not to bar the sellers from exercising their right of lien on the balance in their hands for payment of the selling price of the whole. It was remarked in this case, that the inference of assent will be more readily made in the case of a sale of specific goods than in the case of a sale of unascertained goods.

Right of withholding delivery where property has not passed.

Where the property in the goods has not passed to the buyer, and where, consequently, the seller can have no lien upon them, as above explained, the Act provides that the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his right of lien and stoppage in transitu, where the property has passed to the buyer (§ 39 (2)). The meaning of this provision is not clear. The other remedies here referred to seem to be those contained in Sections 49 (2) and 50, but these have nothing to do with the right of lien, but only with the right of personal action against the buyer. The effect of the Section under consideration, therefore, seems to be that the right of withholding delivery, where the property has not passed, is similar to and co-extensive with the right of lien where the property has passed, no more and no less. The result, therefore, appears to be that the seller can only withhold delivery until the price of the goods is paid or tendered. He cannot retain them in security for a separate debt. If this be so, the Act makes a serious alteration in the law of Scotland. Prior to the Act the seller in Scotland

(*e*) *Mordaunt Bros.* v. *The British Oil & Cake Mills*, 1910, 2 K.B. *per* Pickford, J., at p. 507.

was entitled, where the property in goods sold by him had not passed to the buyer, to retain them against the buyer and his assignees till every debt due and payable to him by the buyer was paid or satisfied (*f*), and this irrespective of whether the buyer was solvent or insolvent.

In accordance with the principle just stated it has been held in England that a seller in an instalment contract, where the buyer is solvent, has no lien on one instalment for the unpaid price of a previous one (*g*). If, however, the buyer be insolvent the seller in England, and presumably in Scotland also, can refuse to deliver until the price of both instalments is paid, even although the sale was on credit terms (*gg*). But apparently the lien would not extend to cover a debt arising out of a different transaction.

Right of seller to attach goods for a separate debt.

Whether or no the seller can still in Scotland retain the goods in his hands in security for other debts, he has the same rights against them that any other creditors of the buyer has. He can attach them while still in his own hands or possession, by arrestment or poinding (§ 40). The effect of such proceedings, however, will be subject to the law of bankruptcy, and will not necessarily give him a preferable right to the goods in competition with other creditors.

Right of lien depends on possession of the goods.

The right of lien depends upon the possession of the goods, and is lost on their being delivered to the

(*f*) *Black* v. *Bakers of Glasgow*, 6 M., *per* Lord President Inglis, at p. 140.
(*g*) *Steinberger* v. *Atkinson*, 31 T.L.R. 110.
(*gg*) *Ex parte Chalmers*, L.R. 8 Ch. 389; *Morgan* v. *Bain*, L.R. 10 C.P. 15.

buyer (§ 43). We have above considered what amounts to delivery, actual or constructive (*h*), but the difference in the effect of the transfer of a bill of lading, and the transfer of other documents of title is here specially noticeable. The endorsation and delivery of a bill of lading is, as we have seen equivalent to the delivery of the goods themselves, and the right of lien comes to an end.

Effect of delivery of a bill of lading.

Delivery of other documents of title.

The transfer of any other document of title is not equivalent to delivery of the goods, until intimation to the custodier of the goods and acknowledgment by him. If, therefore, the seller has transferred a delivery order to the buyer, he is entitled, in any question between him and the buyer, to countermand it before it is so intimated, and his lien will continue (*i*). And the same is true in the case of the handing over of any other document of title, except a bill of lading. But this only applies in a question between the seller and his immediate buyer.

Delivery to a carrier.

Delivery of the goods to a carrier for the purpose of transmission to the buyer, without reserving the right of disposal of the goods, terminates the lien, unless where the seller has undertaken to deliver the goods at their destination, when, of course, delivery only takes place at the destination. Where the right of disposal is reserved, as in the case where the seller takes a bill of lading, making the goods deliverable to himself or his agent, the delivery to the carrier is obviously not delivery to the buyer.

Effect of transference of a document of title.

It has just been said that the mere transfer by

(*h*) See p. 96.

(*i*) *M'Ewan* v. *Smith*, 2 H.L.C. 309; *Griffiths* v. *Perry*, 1 E. & E. 680.

the seller of a document of title, other than a bill of lading, does not put an end to the unpaid seller's lien in a question between the seller and the buyer. But if such document of title is transferred by the buyer to a person who takes the document in good faith, and for valuable consideration, then the seller's right of lien is defeated. Such a person gets a good title as sub-buyer or pledgee, as the case may be, free from the unpaid seller's right of lien (§ 47). This is another instance of the favour shown by the law to transactions entered into with persons in possession of goods, or of documents of title to goods.

The sub-buyer must, however, be acting in good faith, and not in collusion with the first buyer for the purpose of depriving the original seller of his rights. If he knows that this is the object of the first buyer, then the transfer to him will have no effect, as, for instance, if he knows that the first buyer is insolvent and cannot pay for the goods. And if he has grounds for suspecting this to be the state of matters, and refrains from making enquiries, simply to avoid having his suspicions turned into certainty, then he is not acting in good faith, and the result is the same (*j*). But knowledge only of the fact that the first buyer has not paid for the goods, does not infer bad faith on the part of the sub-buyer. That is an every day state of matters in business.

When a seller gives to the buyer a delivery order for the goods sold, he transfers a document of title in the sense of the Act, so that if the buyer hands on the delivery order to a sub-buyer in the circum-

(*j*) *Jones* v. *Gordon*, 2 A.C. at p. 629.

stances stated, the lien of the original seller is gone (*k*). And this is so, even where the delivery order refers only to a portion of the goods in the store belonging to the seller and not to specific goods (*l*).

Stoppage in transition.

2. Another right which an unpaid seller has against the goods is the right of stoppage in transitu.

As we have seen the unpaid seller's lien comes to an end when he gives up the possession of the goods, either to the buyer, or to a carrier for the purpose of transmission to the buyer. By the old law merchant adopted into the common law, however, the unpaid seller still has, in certain cases, rights against the goods.

When the buyer of goods becomes insolvent, the unpaid seller, who has parted with the possession of the goods, has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price (§ 44).

Who may stop.

The term "unpaid seller" in this connection has the same meaning as in the case of lien. And it is to be noted that, just as in the case of lien, the right to stop is only in respect of the unpaid price of the goods in question. If they be fully paid for, they cannot be stopped in respect of the unpaid price of a previous instalment (*m*), or of another debt.

But in addition, other persons may exercise the right of stoppage in transitu. Thus the person who in general acts for a foreign merchant, though he hold no special commission, is allowed on the

(*k*) *Ant. Jurgens* v. *Dreyfus*, 1914, 3 K.B. 40.
(*l*) *Capital, &c., Bank* v. *Warriner*, 1 Com. C. 314.
(*m*) *Merchant Banking Co.* v. *Phœnix, &c., Co.*, L.R. 5 Ch. D. 205.

sudden bankruptcy of the buyer to stop on behalf of his principal (*n*). Even a party who has no authority to act for the seller may volunteer to stop in his interests, and this may be afterwards ratified by the seller, but the ratification must be before the transit has come to an end (*o*).

Buyer must be insolvent

It is a condition of the right to stop that the buyer is insolvent. A person is deemed to be insolvent in this connection who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due (§ 62 (3)), and it lies upon the seller to prove this. If he cannot do so he will, of course, incur serious liability to the buyer. But proof of insolvency at the date of the arrival of the goods at their destination will be sufficient to justify a previous stoppage (*p*).

Definition of course of transit.

Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier, for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier, or other bailee or custodier (§ 45 (1)).

The right to stop commences at the point where, as we have seen, the right of lien terminates, viz., when the goods are delivered by the seller to a carrier, or other bailee or custodier, for the purpose of transmission to the buyer. The point of time when it terminates depends on the facts in each case, which

(*n*) *Whitehead* v. *Anderson*, 9 M. & W. 518; Bell's *Com.* I. 249.

(*o*) *Hutchings* v. *Nunes*, 1 Moo. P.C. N.S. 243; *Bird* v. *Brown*, 4 Ex. 786.

(*p*) *The Constantia*, 6 Rob. Adm. at p. 326; *The Tigress*, 32 L.J. Adm. at p. 101.

may or may not indicate that the buyer has taken delivery in the sense of the Act.

Continues while goods remain in possession of a middleman.

As long as the goods remain in possession of a middleman, or of some person intervening between the vendor who has parted with, and the purchaser who has not yet received them, they may be stopped (*q*).

Delivery to servant of buyer.

But if the goods are delivered to a servant of the buyer who has sent for them, there is no middleman in the case. Delivery to the servant is actual delivery to the buyer.

Delivery to buyer's ship-master.

And in the general case, delivery of goods to the master of a ship belonging to the buyer amounts to the same thing. But in this case the seller may preserve his right to stop, by taking bills of lading making the goods deliverable not to the buyer but to himself or his agent. The master then becomes a carrier for the seller, and is not an agent to receive delivery for the buyer, and the right to stop remains.

Delivery to ship chartered by buyer.

When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent for the buyer (§ 45 (5)). In the common form of charter party the master remains the servant of the shipowners, and the effect of the contract of carriage is merely to give the charterer the use of the vessel to carry his goods. The master is, therefore, a middleman between the seller and buyer, and the goods may be stopped in

(*q*) *Schotsman* v. *Lancashire & Yorkshire Ry. Co.*, 2 Ch. 332; *Berndtson* v. *Strang*, 4 Eq. 481 3 Ch. 588.

his hands. If, however, the effect of the contract of carriage is to give the charterer the possession and control of the ship, and the master becomes his servant, the case is the same as if the ship were his own, so far as the right to stop is concerned.

In contracts f.o.b.

Where goods are purchased f.o.b., questions have arisen as to when the transit and the right to stop terminates. Where coals were bought f.o.b. Burntisland for exportation, and not for sale to any person in Great Britain, and the coal was delivered and shipped at Burntisland in a vessel chartered by the buyer, bills of lading being granted to him, it was held that when the coal was placed on board ship, delivery to the buyer had been completed, and that the seller's right to stop had terminated (*r*). The destination of the goods, in terms of the contract, was held to be the ship. The master of the ship was not an intermediate person between the seller and the buyer, but a carrier from the buyer to a new purchaser under a new contract with which the original seller had no concern, and the goods could not be stopped in his hands.

In similar circumstances the Court in England came to an opposite conclusion (*rr*). China clay was sold f.o.b. at a specified port. The buyer chartered a ship and gave notice to the seller, who then delivered the clay on board. No bill of lading was granted. The destination of the clay had not been communicated to the seller. The buyer became insolvent and the seller was held entitled to stop the goods in the ship.

(*r*) *Cowdenbeath Coal Co.* v. *Clydesdale Bank*, 22 R. 682
(*rr*) *Ex parte Rosevear China*, 11 Ch. D. 560

That case was considered in the Scottish case above cited, but distinguished on the ground that the English Court proceeded on the view that the goods were destined to the purchasers at Glasgow, and were put by the vendor into the hands of a carrier to be conveyed to the purchaser at Glasgow. The case was further considered in a subsequent case in England (*s*), where a somewhat similar explanation of it was given.

Whether these explanations of the case are satisfactory or not, it is submitted that the law is as stated in the Scottish case, following, as it did, on a previous decision to the same effect (*t*).

Destination.

The destination of the goods may be fixed either by the contract of sale or by directions subsequently given by the buyer, and the transit will continue until the goods have reached that destination (*u*). If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer or his agent that he holds the goods on his behalf, and continues in possession of them as custodier for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer (§ 45 (3)).

The goods may have reached their destination, but while they still remain in the hands of the carrier, the transit may or may not have terminated according to the facts of the case. The question depends on the capacity in which the carrier continues to hold

(*s*) *Kendall* v. *Marshall*, 11 Q.B.D. 356; see also *Bethell* v. *Clark*, 19 Q.B.D. at p. 562.

(*t*) *Morton* v. *Abercromby*, 20 D. 362.

(*u*) *Ex parte Watson*, 5 Ch. D. 35; *Bethell* v. *Clark*, 20 Q.B.D. 615; *Ex parte Cooper* 11 Ch. D. 68.

the possession of the goods. If the carrier continues to hold them simply as a carrier waiting for orders from the buyer as to their disposal, then the transit is not at an end, and the goods can be stopped in his hands. But if the carrier, by agreement between himself and the buyer, undertakes to hold the goods for the buyer, not as carrier to him, but as his agent, the transit is at an end (*v*). Both the carrier and the buyer must concur in this change in the capacity in which the carrier holds the goods. So if the buyer has not been notified of the arrival of the goods, the transit is held to continue (*w*), and, on the other hand, the buyer cannot force the carrier to become his bailee to keep the goods without the latter's consent, and, until he does consent, the transit continues in like manner (*x*).

Delivery before goods reach destination.

If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end (§ 45 (2)). There is nothing to prevent the carrier and the buyer agreeing together for the delivery at any place they please (*y*). But if the buyer obtains delivery before the goods arrive at their destination by force or fraud, the effect of this seems to be doubtful (*z*).

Part delivery.

Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder

(*v*) *Ex parte Cooper*, 11 Ch. D. 68.; *Muir* v. *Rankin*, 13 S.L.T. 60.
(*w*) *Ex parte Barrow*, 6 Ch. D. 783.
(*x*) *Whitehead* v *Anderson*, 9 M. & W. 518; *Coventry* v. *Gladston*, 6 Eq. 44.
(*y*) *L. & N. W. Rly. Co.* v. *Bartlett*, 7 H. & N. 400; *Mechan* v. *N. E. Rly Co.*, 1911, S.C. 1348.
(*z*) *Whitehead* v. *Anderson*, cited above; but see Blackburn on *Sale*, p. 406, and *Bird* v. *Brown*, 4 Ex. 786.

of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods (§ 45 (7)), or unless the carrier holds the undelivered goods as custodier for the buyer, as above explained.

When carrier wrongfully refuses to deliver.

Where the carrier or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end (§ 45 (6)). The rights of the buyer cannot be impaired by the wrongful act of the carrier.

When buyer rejects the goods.

If the goods are rejected by the buyer and the carrier or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back (§ 45 (4)) (*a*).

In cases of insolvency of buyer.

Cases of this kind may arise where the buyer finds that he is insolvent before goods are delivered to him. He is then entitled to reject the goods, and the seller, on intimation of that rejection, may rescind the contract, and the goods then remain the property of the seller. In order to the rejection of goods, it is not necessary to go through any particular form. It is enough for the purpose of rejection that it shall be clearly indicated, and in some way notified, to the sellers. The buyer may even receive the goods into his warehouse for the purpose of safe keeping. If he at the same time makes it clear that he is not taking delivery of them as buyer, the rights of the seller will be preserved (*b*). After sequestration, however, the buyer has no power to reject goods brought to him

(*a*) *Bolton* v. *Lanc. & Yorks. Rly. Co.* L.R. 1 C.P' 431.
(*b*) *Booker* v. *Milne*, 9 M. 314; *James* v. *Griffin*, 2 M. & W. 623.

for delivery (*c*), and they will fall into his sequestrated estate.

How stoppage is effected.

The unpaid seller may exercise his right of stoppage in transitu, either by taking actual possession, or by giving notice of his claim to the carrier or other custodier, in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice to be effectual must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer (§ 46 (1)). When notice of stoppage in transit is given, the carrier or other bailee or custodier in possession of the goods must redeliver them to the seller. The expense of such redelivery must be borne by the seller (§ 46 (2)), and he must also pay to the carrier the freight due in respect of them since they were put into his hands (*d*).

If, before the seller has stopped the goods, the buyer has transferred a document of title to them to a person who takes the document in good faith, and for valuable consideration, then the seller's right of stoppage in transitu is defeated (§ 47). Such a person gets a good title as sub-buyer or pledgee, as the case may be, free from the unpaid seller's right. The case is the same as that above considered in reference to lien (*e*).

Re-sale.

3. Lastly, the unpaid seller has in certain cases the right to resell the goods.

(*c*) Bell's *Com.* I., 255.
(*d*) *Booth Steamship Co.* v. *Cargo Fleet Co.*, 1916, 2 K.B. 570.
(*e*) See p. 148.

A contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transit (§ 48 (1)). His right is to hold, or to resume and hold, possession of the goods as the case may be in security for payment of the price, and no more. The right to the goods remains in the buyer, and he, or the trustee in his bankruptcy, is entitled to delivery on tendering the price, if this be done within a reasonable time. But obviously matters cannot be allowed to remain in this position for an indefinite time, and the seller has therefore certain rights to resell the goods.

Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract (§ 48 (3)). Again where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages (§ 48 (4)).

Apparently these are the only cases in which the unpaid seller is entitled to resell. If he resells in any other circumstances, it is a wrongful act, and he will be liable to the buyer in damages. The new buyer, however, gets a good title to the goods, as against the original buyer (§ 48 (2)).

CHAPTER X.

Some Special Forms of Contracts of Sale.

There are some special forms of contracts of sale which require separate consideration.

I.—Contracts of Sale f.o.b.

A contract of sale f.o.b. is a contract whereby the seller undertakes to deliver the goods free of charge at a certain place, namely, on board a ship provided by the buyer. Delivery at that place is fulfilment of the seller's obligation, and the property in the goods and the risk then passes in the usual case to the buyer. But where the seller who has not received payment of the price of the goods on delivering them on board the ship, takes a receipt for them in his own name (*a*), or takes a bill of lading making the goods deliverable to his own order, and retains the bill of lading in his own or his agent's hands, he retains his lien for the price (*b*).

If anything impedes or obstructs the shipment, the seller must remove it, he cannot otherwise fulfil his contract. So if after the contract is entered into an export duty is laid on the goods and shipment is prohibited until the duty is paid, the seller must pay the duty (*c*).

(*a*) *Craven* v. *Ryder*, 6 Taunt 433; *Ruck* v. *Hatfield*, 5 B. & Ald. 632.
(*b*) *Ogg* v. *Shuter*, 1 C.P.D. 47.
(*c*) *Bowhill* v. *Tobias*, 5 F. 262.

We have already considered the obligation of the seller to give notice to the buyer to enable him to insure the goods (*d*), and the right of the seller to stop in transitu under such contacts (*e*).

II.—Contracts of Sale c.i.f.

Sales at a price to cover cost freight and insurance are a very well known form of the contract of sale. Under such the buyer who is importing goods into this country knows at once what they will cost him delivered here, and can at once dispose of them even before they have arrived.

In carrying out such contracts the seller makes out an invoice debiting the buyer with the agreed price and giving him credit for the amount of the freight, which he, the buyer, will have to pay to the shipowner on delivery. For the balance a draft is drawn on the buyer which he is bound to accept, on having handed to him the charter party bill of lading and policy of insurance. Should the ship arrive, with the goods on board, the buyer will have to pay the freight, which will make up the amount which he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some miscontract on the part of the masters or mariners not covered by the policy, he will recover it from the ship owner. In substance, therefore, the buyer pays, though in a different manner, the same price as if the goods had

(*d*) See p. 112. (*e*) See p. 153.

been bought and shipped to him in the ordinary way (*f*).

The seller under such a contract has, firstly, to ship at the port of shipment goods of the description contained in the contract, secondly, to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice as above described, or in some similar form and finally to tender these documents to the buyer, so that he may know what freight he has to pay, and obtain delivery of the goods if they arrive, or recover for their loss if they are lost on the voyage (*g*).

Passing of the property and risk.

The question when the property and the risk in the goods passes to the buyer under such a contract, depends on the ordinary rules of law applicable in such cases. If the seller takes a bill of lading making the goods deliverable to himself or to his agent at the port of discharge, thus retaining the power of disposal of the goods, the property and risk will remain with him. But if he endorses and sends the bill of lading to the buyer, the property and risk will thereupon pass to the buyer (*h*). On the other hand, if he takes a bill of lading making the goods deliverable to the buyer, the property and risk will pass to the buyer on the shipment of the goods.

Payment of the price.

When the charter party, bill of lading, invoice, and

(*f*) *Ireland* v. *Livingston*, L.R. 5 H.L. *per* Blackburn, J., at p. 406.
(*g*) *Biddell* v. *Clemens*, 1911, 1 K.B. *per* Hamilton, J., at p. 220.
(*h*) *Delaurier* v. *Wyllie*, 17 R. *per* Lord Trayner at p. 173; *M'Dowall* v. *Snowball*, 7 F. 35.

policy of insurance are tendered to the buyer, he must be ready and willing to pay the price, although the goods have not arrived. This is generally expressly stipulated in the contract by the words "cash against shipping documents," or by similar words. But even if there be no such express stipulation, such a stipulation is implied. When the seller tenders shipping documents, which are conform to the contract, he has performed all that is incumbent on him. The contract is not one to deliver goods in this country. The seller is not responsible for any such delivery. The delivery of the bill of lading is equivalent to the delivery of the goods, and, on getting delivery of the bill of lading and policy of insurance, the buyer is in a position to deal with the goods as he likes, and to recover their value if they are lost. The price is therefore, there and then payable. Of course, if he pays against documents, and the goods, after their arrival, are found not to be in accordance with the contract, he will be entitled to recover his money back, or to damages, if he prefers that remedy, but he cannot claim to delay payment of the price until he has had an opportunity for examination (*i*).

The policy of insurance.

The obligation on the seller to tender a policy of insurance as one of the shipping documents, is strictly enforced. It is one of the documents which must be transferred to the buyer in order to effect a complete delivery under a c.i.f. contract. Unless the goods have been insured, and a policy tendered, the buyer is not bound to pay the price. The fact that

(*i*) *Biddell* v. *Clemens*, 1911, 1 K.B. *per* Kennedy L.J., at p. 952, 1912, A.C. 18.

the goods have, in fact, arrived safely at their destination is immaterial (*j*).

The buyer is entitled to a policy of insurance which relates to the goods which are the subject matter of his own contract of sale, and to no other goods (*k*). He is, therefore, not bound to accept a broker's cover note, or a certificate of insurance, instead of such a policy although in practice these are often accepted by buyers. These do not give the same rights to the buyer against the insurers which he gets under a policy (*l*).

Condition of the goods.

The condition of the goods at the time of the tender of the shipping documents is not material. They may be at the bottom of the sea (*m*), or, through some unforeseen circumstances, they may never arrive, or they may have been lost owing to some cause not covered by the agreed form of policy. In all such matters the risk is on the buyer, and he must pay the price on tender of the shipping documents (*n*).

Documents must be effective.

But these documents must be effective documents at the date when they are tendered. If at that date they have become void and unenforceable, as, for instance, where the ship in which the goods are has become the ship of an enemy of this country, the buyer is entitled to refuse the tender of such documents, or to pay the price (*o*). A c.i.f. contract is not a mere contract for the sale of documents. It

(*j*) *Orient Co.* v. *Brekke*, 1913, 1 K.B. 531.
(*k*) *Manbre, &c., Co.* v. *Corn, &c., Ltd.*, 1919, 1 K.B. 198.
(*l*) *Wilson* v. *Belgian, &c., Co.*, 1920, 2 K.B. 1.
(*m*) *Manbre, &c, Co.* v. *Corn, &c., Ltd.*, 1919, 1 K.B. 198.
(*n*) *Weir* v. *Credit, &c.*, 1916, 1 K.B. 346.
(*o*) *Karlberg* v. *Blyth*, 1916, 1 K.B. 495; *Duncan* v. *Schrempft*, 1915, 3 K.B. 355.

is a contract for the sale and purchase of goods under which the delivery of the goods may be effected, first, by placing them on board ship, and, secondly, by transferring to the buyer the shipping documents. In order truly to perform his contract the seller has to deliver documents by virtue of which the buyer may, if the goods are in existence, obtain delivery of them, and by virtue of which, if the shipowner has not fulfilled his obligation imposed by the contract of affreightment, the buyer may have such remedies as the contract of affreightment would give him. (*p*).

Risks covered by the insurance.

Where there is no special stipulation in regard to the nature of the policy of insurance, or the risks to be insured against, the insurance must be of the character usual in the trade and of the usual scope and comprehensiveness (*q*). If the policy handed over is for more than the contract price, the buyer is entitled to recover the whole (*r*)

Provision "duty paid."

Contracts c.i.f. sometimes provide further "duty paid," thus relieving the buyer of payment of duty which would otherwise fall upon him. But this stipulation does not cover a new duty or an increase of duty imposed after the date of the contract. That will still fall upon the buyer (*s*).

Quantity of goods delivered by the ship.

When the shipping documents are tendered to the buyer, he will pay according to the quantity of goods stated in the bill of lading. If the ship delivers less

(*p*) *Karlberg* v. *Blyth*, 1916, 1 K.B. *per* Warrington L.J. at p. 514.
(*q*) *Birkett* v. *Engholm*, 10 M. 170.
(*r*) *Landlauer* v. *Asser.*, 1905, 2 K.B. 184; *Ralli* v. *The Universal, &c., Co.*, 31 L.J., Ch. 133. See as to honour policies, *Strass* v. *Spillers, &c., Ltd.*, 1911, 2 K.B. 759. But these are now made illegal by the Marine Insurance (Gambling Policies) Act, 1909,
(*s*) *Finance Act*, 1901, § 10 (1); *American, &c., Co.* v. *Bœhm*, 35 T.L.R. 224.

than this quantity, the buyer will be entitled to get back from the seller the sum overpaid. Sometimes, however, it is provided in the contract that the quantity stated in the bill of lading is to be conclusive as between the seller and the buyer, and the buyer will then take his chance of any deficiency (*t*), without prejudice of course, to any claim he may have against the shipowner.

Distinction between contract of sale c.i.f. and contract of agency.

A question may sometimes arise as to whether there has been a contract of sale c.i.f. between the parties, or whether there has been a contract of agency in which a principal in this country has instructed a party abroad to buy for him goods at a price not exceeding a certain amount c.i.f. The obligations of the parties will obviously differ widely in the two cases, and the decision will depend upon the construction of the correspondence.

But an important principle has been laid down in a case of this kind. If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised, because he meant the order to be read in the other sense of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority, to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his order in clear and unambiguous terms (*n*).

(*t*) *Covas* v. *Bingham*, 2 E. & B. 836.
(*u*) *Ireland* v. *Livingstone*, L.R. 5 H.L. *per* Lord Chelmsford at p. 416.

III.—Sales by Auction.

Sales by auction differ from ordinary contracts of sale, principally in this, that while in the latter the price is arrived at by negotiation between the parties, in the former it is arrived at by competition between those desiring to buy, the highest bidder being preferred to the sale.

Fairness must be observed by all parties.

It follows from this that perfect fairness and *bona fides* must be observed in the bidding, both on the part of the exposer and of the bidders.

Secret bidding by exposer.

The exposer may not secretly and privately enhance the price by employing a person to bid at the auction. That is a fraud upon the sale and upon the public (*v*). Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it is not lawful for the seller to bid himself, or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or such person. Any sale contravening this rule may be treated as fraudulent by the buyer (§ 58 (3)). If, therefore, there has been any such illegal bidding and the property has been ultimately knocked down to a *bona fide* bidder, the latter may rescind the sale on the ground of fraud. But he has a further right. If he desires it, he is entitled to have the property at the last price he bid prior to the commencement of the illegal bidding. The illegal bidding is cleared out of the way, and he remains the highest bidder, and as such, entitled to be preferred to the sale (*w*).

(*v*) *Bexwell* v. *Christie*, 1 Cowp. 395; *Howard* v. *Castle*, 6 T.R. 642.

(*w*) *Faulds* v. *Corbet*, 21 D. 587.

The above principle applies to cases where the illegal bidding is at the instance of the exposer of the property. In other cases where there is no such fraud on the part of the exposer, and the bidding has been merely by parties who were not entitled to bid, as, for instance, where a person in a fiduciary capacity bids for and becomes the purchaser of property held by him in that capacity, the sale will be set aside, but the challenger must be a beneficiary under the trust. A person who is merely a competing bidder has no right to challenge the sale, or to claim the property at the price he bid before the illegal bidding commenced (*x*).

Right of the exposer to bid may be reserved.

But the exposer is entitled to take steps to prevent the property being disposed of for less than its value. A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller or any one person on his behalf may bid at the auction (§ 58 (4)).

Bidders may not prevent free competition.

The bidders, on the other hand, are bound by a similar obligation to the exposer, not to use any unfair means to prevent free competition at the roup. So where the only persons who intended to purchase at an auction entered into an agreement whereby one of them, for their common benefit, was to purchase the subject at the upset price. Each man was then to mark secretly on a slip of paper the highest offer which he had been commissioned to make, and he

(*x*) *Shiell* v. *Guthrie's Trs.*, 1 R. 1083; *Wright* v. *Buchanan*, 1917, S.C. 73.

whose offer was found on comparison to exceed the rest was to be preferred to the purchase, while the excess of that highest offer above the upset price was to be distributed among the associates to the amount to which their several offers should have concurred. This plan was carried out. On learning of it the exposer complained to the Court by petition, praying that the sale might be declared void, and the subjects ordered to be exposed anew. The Court granted the prayer of the petition, and found the party to whom the property had been knocked down at the sale liable for the expenses of re-exposing the property (*y*).

In another case the Court found that it was unlawful for a person intending to bid at a roup to give money to others that they might refrain from bidding (*z*). But later cases in England throw doubt on these decisions (*a*)

It seems impossible to say that all such agreements between bidders will have the effect of voiding a sale by auction. If two persons attending an auction agree that neither will bid against the other, it is difficult to see on what ground the exposer can complain. But unfair means used to prejudice a sale will certainly entitle the exposer to rescind the sale, as where a party persuades the assembled company by untrue statements not to bid against him (*b*). It seems to be a question of circumstances in each

(*y*) *Murray* v. *M'Whan*, M. 9567.
(*z*) *Aitchison*, M. 9567.
(*a*) *Galton* v. *Emuss*, 13 L.J. Ch. 388; *In re Carew's Estate*, 28 L.J. Ch. 218; *Heffer* v. *Marlyn*, 36 L.J., Ch. 372; *Rawlings* v. *General Trading Co.*, 1921, 1 K.B. 635.
(*b*) *Fuller* v. *Abrahams*, 3 B. & B. 116.

case, and if it can be shown that the agreement between the bidders is for the purpose of shutting out competition and depressing the sale so as to obtain the property at a sacrifice, then apparently the sales can be set aside. It has been so held in the United States (*c*).

Each lot is the subject of a separate contract.

Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale (§ 58 (1)). One consequence of this principle is that if one lot is disconform to the conditions of sale it may be rejected by the buyer, while other lots bought by him may be retained (*d*). And the buyer cannot reject one lot on the ground of a defect in another, unless, to the knowledge of both buyer and seller, the purpurchases depended on each other (*e*). It would be otherwise if the whole of the lots purchased were regarded as one transaction (*f*).

When sale complete.

A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid (§ 58 (2)). The bid is regarded as an offer, the falling of the hammer is regarded as the acceptance of the offer.

If the sale has been notified to be subject to a reserved price, and the bid does not come up to that price, the auctioneer, of course, will not accept it, and if he lets the hammer fall by mistake, that does

(*c*) *Kearney* v. *Taylor*, 15 How 494.
(*d*) *Couston* v. *Chapman*, 10 M. (H.L.) 74.
(*e*) *Holliday* v. *Lockwood*, 1917, 2 Ch. 47.
(*f*) See p. 72.

Sale without reserve.

not complete a contract (*g*). But, if the sale is advertised to be without reserve, the property must be knocked down to anyone who makes a bid, whatever its amount may be (*h*).

Advertisement of sale by auction.

The advertising of a sale by auction of certain property is merely a declaration of an intention to hold such a sale. It does not amount to a contract to do so, and the exposer may change his mind without incurring liability to others who have incurred expense in attending at the time and place advertised (*i*).

Conditions of sale.

Sales by auction are generally conducted under conditions, and if a bidder, as matter of fact, was unaware of these conditions he will still be bound by them, and they will form part of his contract if the exposer has done all that is reasonably necessary to bring them to his knowledge. That is a question of fact (*j*).

Position of auctioneer.

The auctioneer at a sale by auction is the judge of the roup. But he is not an arbiter in any proper sense regarding questions arising after the sale is over, as to the liabilities of parties as seller or purchaser, or as to the validity of the roup. He is simply appointed to see fairplay on both sides at the sale, and to interfere if anything irregular is done. Whatever de decides in such matters is binding upon the parties. A question, therefore, as to the *bona fides*

(*g*) *M'Manus* v. *Fortescue*, 1907, 2 K.B. 1.

(*h*) *Warlow* v. *Harrison*, 1 E. & E. 295; *In re Agra, &c., Bank* 2 Ch. at p. 397; *Johnston* v. *Boyes*, 1899, 2 Ch. 73; *Spencer* v. *Harding*, L.R. 5 C.P. at p. 563;

(*i*) *Harris* v. *Nickerson*, L.R. 8 Q.B. 286.

(*j*) *Hain* v. *Laing*, 15 D. 667; *Macdonald* v. *Henderson*, 10 R. 95; *White* v. *Dougherty*, 18 R. 972.

of a bid at an auction, which does not emerge until after the actual sale is over, does not fall to be decided by the judge of the roup (*k*).

IV.—Contracts of Hire Purchase.

The object of the contract of hire purchase is to give immediate possession and use of an article to a purchaser, without requiring immediate payment of the whole of the price.

Such contracts are in general in one of two forms, the effects of which are very different. They are, however, often so loosely drawn, that there is difficulty in determining of which kind the particular contract may be. To determine this the substance of the transaction evidenced by the agreement must be looked at and not its mere words, and the rights and obligations of the parties must be ascertained from a consideration of the whole of the agreement. Two forms of the contract.

In both forms of the contract the first party gives to the second party immediate possession of the article, but it is stipulated that no property in the article shall pass until all the instalments of the price are paid.

In the first form of the contract it amounts to this, that there is on the part of the second party a definite agreement to buy, and an absolute obligation by him to pay the purchase money in certain instalments. He is not entitled at any time to return the article, and absolve himself from any obligation to make further payment. It is, therefore, simply an

(*k*) *Strachan* v. *Auld*, 11 R. 756.

agreement to buy, the passing of the property being deferred until the payment of the last instalment (*l*).

In the second form there is no such absolute obligation to buy and to pay all the instalments. All that the second party undertakes is to pay the instalments so long as he keeps the article. He has an option to buy by completing the payment of all the instalments, and the property in the article will then pass to him, but he may if he likes, return the article at any time, and, if he does, so his liability for any further payment ceases. This obviously does not amount to an agreement to buy, it is only a hiring of the article with an option to purchase on paying the whole of the stipulated instalments (*ll*).

Nature of the instalment.

It is clear that in both forms of the contract each instalment must be made up partly of a payment to account of the price of the goods, and partly of interest on the balance of the price remaining unpaid. On no other basis could the first party arrive at a figure which will represent the selling price of the article which he requires. The second party, therefore, is not entitled to claim that the instalments which he has paid should be credited *in toto* to the price in a case, for example, where by the agreement he is entitled at any time to become the purchaser by payment in cash of a specified price, under deduction of the whole sums previously paid by him. He is only entitled to credit for the amount which has been paid to account of capital (*m*).

(*l*) *Lee* v. *Butler*, 1893, 2 Q.B. 318.
(*ll*) *Helby* v. *Matthews*, 1895, A.C. 471.
(*m*) *Taylor* v. *Wylie*, 1912 S.C. 978.

Effects of the two forms of contract.

As has been said the legal effects of the two forms of contracts of hire purchase are very different.

The first clearly falls under the provisions of Section 25 (2) of the Act (*n*). The second party has agreed to buy the article, and has obtained possession of it with the consent of the first party. If, therefore, he sells pledges, or otherwise disposes of it to any third person who receives it in good faith and without notice of the rights of the first party in respect of the goods, such third person will obtain a good title in preference to the first party (*o*). If, however, the second party becomes bankrupt before all the instalments are paid, his creditors can only claim the article on payment of the balance of the instalments. The creditors can have no better title to the article than the bankrupt had.

Under the second form of the contract the second party until he exercises his option to buy is merely a hirer of the article. He, therefore, cannot dispose of it and give a title to anyone preferable to that of the first party (*p*). But the claim of the first party against the person to whom the second party has thus wrongfully disposed of the article is not its full value, but only the value of the first party's interest in it, that is to say, the amount of the instalments remaining unpaid (*q*).

The second party under this form of the contract, although he is only a hirer, has an interest in the article, to wit, his option to purchase it, and he has a right

(*n*) See p. 91.
(*o*) *Lee* v. *Butler*, 1893, 2 Q.B. 318.
(*p*) *Helby* v. *Matthews*, 1895, A.C. 471.
(*q*) *Belsize Co.* v. *Cox*, 1914, 1 K.B. 244

to dispose of this interest by sale or otherwise. During the currency of the contract he is entitled to sell his interest, and if he has in no way been in breach of the contract, the purchaser from him will take his place under it and be entitled to carry it out in the same way (*r*).

(*r*) *Whiteley* v. *Hill*, 1918, 2 K B. 808.

Index

Index

PAGE

"ABOUT" 31, 103

ACCEPTANCE OF THE GOODS—
- Meaning of 113
- Duty of buyer 113
- Effect of neglect of buyer 113
- Buyer must have opportunity to examine . . 113
- When buyer is deemed to have accepted . . . 114
- Consequence of acceptance 114
- Delay in, effect of 115
  - If defects latent 115
- Goods to be sent abroad 116
- If buyer deals with goods as owner 117
- Meaning of in England 117
- Special stipulations as to 71, 118
- Goods may be rejected although property has passed. 64, 119
  - Goods rejected need not be returned . . 119

ACTIONS FOR BREACH OF THE CONTRACT—
- Rights and remedies of the seller—
  - Where the property has passed he may sue for the price with interest 124
  - Alternatively he may sue for damages . . 125
  - Measure of damages 125
  - "Available market" 125
  - Where property has not passed he may sue for damages 126
  - In one case he may sue for price . . . 127
  - If buyer refuses to implement contract before implement is due 127
  - Where implement repudiated seller need not tender goods 128
- Rights and remedies of the buyer—
  - Where seller refuses to deliver the goods, buyer may sue for damages. 128
  - Measure of damages 128
  - Duty of buyer to minimise loss 129
  - If buyer cannot obtain goods elsewhere he may recover ordinary commercial profit . . 129
  - Buyer need not make extraordinary exertions to supply himself elsewhere 130
  - Special damages—
    - When recoverable 130
    - Profit on sub-sale 131
  - Nominal damages 132

PAGE

Liquidated damages 132
Penalty 133
Deposit, forfeiture of, ... 134
Specific implement. 135
Where seller delivers goods not conform to contract . 136
Buyer may reject the goods or claim damages . . 136
If he rejects he must do nothing inconsistent with that position 137
Seller may tender other goods 138
Measure of damages 138
General damages may be claimed when special damages not claimable 140
Buyer may be called on to consign price . . . 141

AMBIGUITIES IN CONTRACTS—
General rule of construction 24
Latent 25

APPROPRIATION, UNCONDITIONAL—
What amounts to 56
If goods are in seller's warehouse 57
If goods are in warehouse of third party . . . 57
Which party entitled to select 58
Assent of other party to appropriation . . . 58
Appropriation by delivery to a carrier . . . 60
If seller undertakes to deliver at a certain place . 60
Of future goods 62
Shipbuilding contracts 62

APPROVAL—
Sale of goods on, is a conditional sale . . . 53
Distinguished from a sale with a warranty . 54

"AS SOON AS POSSIBLE" 102

"AVAILABLE MARKET" 125

AUCTION—
Sales by 166
Secret bidding by exposer 166
Right to bid may be reserved. 167
Bidders may not prevent free competition . . 167
Sales in lots 169
When sale complete 169
Sale without reserve 170
Advertisement of, does not amount to contract. . 170
Conditions of sale 170

AUCTIONEER—
Legal position of 170

BILL OF LADING—
Actual delivery of goods, by endorsing and handing over 96

PAGE
Not negotiable like bill of exchange . . . 96
Contrasted with other documents of title . . . 97

C.I.F. CONTRACTS—

Seller need not give notice to buyer to enable him to insure 112
Mode of carrying out 160
Passing of property and risk 161
Payment of the price. 161
The policy of insurance 162
Goods need not be in existence when documents tendered 163
Documents must be effective 163
Provision "duty paid" 164
Quantity of goods delivered 164
Distinction between, and contract of agency . . 165

CONDITIONS AND WARRANTIES—

Meaning of terms 67
Effects of breach of—
In England 67
In Scotland 68
Implied—
As to seller's title 69
"Right to sell," meaning of 69
Effect of breach 69
That goods free from incumbrances . . . 69
In sales by description 70
In sales by sample as well as by description . 71
Detailed description 71
Disconformity of a part 72
As to quality, etc. 73
Where goods bought for a particular purpose 74
Meaning of "particular purpose" . . 74
Purpose must be made known to seller . 76
Buyer must rely on seller's skill . . . 76
Goods must be of description dealt in by seller. 76
Sale of article under trade name . . 76
Of merchantable quality 78
In sale of food 79
Sale of dangerous goods 80
That goods are of seller's own manufacture . 80
Express—
Buyer may require 81
Words of commendation 81
What amounts to 81
Distinction between warranty and expression of opinion 83
When contract in writing 83
Does not negative implied warranty . . . 84

PAGE

CONTRACT—
Definition of 1
Assent the basis of. 9
Wagering 42
If formal, prior communings cannot be regarded . 42
Surrounding circumstances may be considered . . 43

CONTRACT OF SALE—
Definition of 39
May be conditional 39
Condition expressed—
Sale of goods "to arrive" 39
Conditions controlling subsequent dealing with goods 40
Condition implied—
Sales on approval or on sale or return . . 40
When bill of exchange sent with bill of lading . 41
How made 41
Implied from conduct 41
English law 41
Subject matter of 44
If goods have perished at the time contract made 44
If goods damaged at the time contract made . 44
If goods perish before the risk passes to buyer . 45
Of unfinished article 50
Of goods to be delivered at a certain place . . 50
Of industrial growing crops 50
Of goods "by description," meaning of term . . 70, 72
By sample 72, 73
Under trade name 76
Of dangerous goods 80
Not rescinded by seller exercising right of lien or of stoppage in transitu. 158

COURSE OF DEALING—
Effect of 32

CUSTOM OF TRADE—
May alter meaning of words 25
May add stipulations to contracts 25
Must be capable of precise definition . . . 26
Must be compulsory 26
Must be general 26
Must be reasonable 27
Is it necessary that both parties be aware of . . 28
Where agent employed 31
Must be consistent with contract 31
Not admissible to vary business meaning of words . 32
Authority of mercantile agent to pledge is not restricted by 90

"DAYS" 102

PAGE

DELIVERY OF THE GOODS—
Seller's duty to deliver 94
In sales for cash 94
In sales on credit 94
Actual—
Where the goods or key of warehouse handed over 96
By endorsing and handing over bill of lading . 96
Constructive—
Of goods in warehouse of third party. . . 97, 99
Time of 100
Effect of delay 100, 101
Stipulations as to 101
"As soon as possible" 102
If no time stipulated 102
Place of 102
Quantity tendered 103
"About," meaning of, ... 103
Goods mixed with goods of different description. 104
By instalments 105
Effect of failure to deliver an instalment . . 105
General rule 106
To a Carrier 109
Seller must make proper contract with carrier . 111
Seller must give notice to buyer if sea transit involved 111
In contracts f.o.b. 112

"DELIVERABLE STATE"—
Meaning of term 49
When what requires to be done is to be done after the goods are delivered 53
Or has to be done by the buyer 53

DEPOSIT, FORFEITURE OF, ... 134

DOCUMENT OF TITLE—
Definition of 88
Delivery by transfer of 97
Proposed change in the law 97

ESSENTIAL ERROR—
Definition of 19

FACTORS ACT, 1889—
Effect of 87
Section 2 (2) 89
Section 2 (4) 89
Section 3 91

F.O.B. CONTRACTS—
Seller must give notice to buyer to enable him to insure 112
Definition 159

PAGE

Passing of property and risk 159
Obligations of seller 159
Stoppage in transitu in 151

FOOD—
Implied warranty in sales of 79

FORCE AND FEAR 22

FRAUD—
On the seller 12
Where buyer intends not to pay . . . 13
Where buyer insolvent the purchase not necessarily fraudulent 13
Fraudulent representations of buyer . . . 14
Buyer not bound to correct misapprehension of seller 10, 14
Effect of 14
How seller may rescind contract . . . 15
On the buyer 16
Fraudulent misrepresentations, definition of . 16
Buyer must show that he was in fact influenced by the misrepresentations. . . . 17
Remedies of the buyer 18
Innocent misrepresentations, definition of . . 19
Effect of 19
Failure of the seller to disclose facts may amount to misrepresentation 20
A representation may be an express warranty . 20
Concealing defects 20
Sales " with all faults " 20
Half truths 21
There may be fraud although no representation is made 21
In contracts of sale or return 54

" GOOD FAITH " 149

HIRE PURCHASE—
Two forms of contract of 171, 173
Nature of the instalments 172

ILLEGALITY—
Wagering contracts 22
Definition of 22
Proof required 23
Contract " to make a market " 23
Position of broker in such contracts . . . 24

PAGE

IMPOSSIBILITY OF PERFORMANCE—
When a valid defence to action for breach of contract. 32
If obvious at time of contract 32
If it only appears subsequently 33
Through change in British law 34
Through change in foreign law 34
Where it arises from the perishing of a person or thing on which performance depends 35
If goods sold perish before risk passes to the buyer . 36
Implied condition of continued existence of a certain state of facts or circumstances 36

INDUSTRIAL GROWING CROPS—
Sale of 50

INSOLVENCY—
Of buyer, effect of on seller's obligation to deliver goods 95
In instalment contracts 107, 147
As regards stoppage in transitu 151
Buyer may reject goods if insolvent. 156

INSTALMENT CONTRACTS—
Rights of parties where other party in breach . . 105
Right to rescind the contract 106
Seller has no lien on an instalment for price of previous instalment except where buyer insolvent . . 107, 147
If buyer does not ask for delivery of an instalment . 107
If no periods stipulated 109

INSURABLE INTEREST—
In goods not unconditionally appropriated . . 60

INSURANCE—
Rights of the buyer in insurance effected by seller . 65

LIEN—
Unpaid seller's right of 142
Definition of unpaid seller 142
What it covers 143
When it may be exercised 144
Not affected by sub-sale 145
Unless seller has assented to sub-sale . . 145
Unless document of title transferred . . . 148
Right to retain when property has not passed . . 146
Where bill of lading has been delivered to buyer . 148
Where other documents of title have been delivered. 148
Where goods have been delivered to carrier . . 148
Effect of transfer of document of title to sub-buyer . 148

LIQUIDATED DAMAGES 132

PAGE

MERCANTILE AGENT—
Definition of 87
Power to pledge by transfer of documents of title . 98

"MERCHANTABLE QUALITY"—
Warranty of, in sale by a dealer 78

MISREPRESENTATIONS—
Fraudulent 14, 16
Innocent 19

MISTAKE—
In offer or acceptance 3
Invalidates assent where essential 9
In the thing sold 9
As to identity of the party dealt with . . . 10
Effect of 11
Definition of essential error 19

"MONTH" 102

"MORE OR LESS" 103

OFFER AND ACCEPTANCE—
Agreement come to by 1
When parties face to face 1
By correspondence. 1
What if acceptance never reaches offerer . . . 2
Retractation of acceptance 2
Withdrawal of offer 3
Invitation to make an offer 4
Price lists 5
Errors in offer, effect of 5
Offer by telegraph 7
Telegram in code 7
Where agreement to be put into formal shape . . 7
Acceptance must be timeous 8
Death, etc., of offerer before acceptance . . . 8

"PARTICULAR PURPOSE," SALE OF GOODS FOR,—
Meaning of term 74

PASSING OF THE PROPERTY 48
General rule in sales of specific goods . . . 49
Where no express agreement . . . . . 49 *et seq.*
If bill of exchange sent with bill of lading . . . 61
In shipbuilding contracts 62
Although property passed buyer may still reject. 64

PENALTY 133

PAGE

PLEDGE—
Delivery essential to valid 97
By mercantile agent 87

PRICE—
How fixed 45
Fixed by valuation 46
Discount on, different meanings of 46
Duty of buyer to pay 119
Legal tender 120
Place of payment 120
Mode of payment 120
Proof of payment 121
What is a good tender 121
Time of payment—
Not of essence of contract unless different intention appears 121
In sales for ready money 121
Payment by bill 122
"Approved acceptance" 123
Payment by cheque 123
Overpayment 123

PROMISE—
Validity of 43

"REQUIREMENTS" 104

RIGHT OF DISPOSAL—
Reservation of 61
In such cases property does not pass. . . 61
If bill of exchange sent with bill of lading . . 61

"RIGHT TO SELL"—
Meaning of term 69

RISK—
Passes with property unless otherwise agreed . . 64
Rights of buyer of goods insured by seller. . . 65
Where delivery of goods delayed 101

SALE OF GOODS ACT, 1893—
Sections of, quoted, summarised, or referred to—
Section 1 39
Section 3 41
Section 4 . . . . . 42, 118
Section 5 44
Section 6 44
Section 7 45
Section 8 46

PAGE

Section 9 46
Section 10 . . . . . 100, 121
Section 11 (1) 68
Section 11 (2) 68, 130
Section 12 . . . . . 69, 70
Section 13 . . . . . 21, 71
Section 14 (1) 74, 79
Section 14 (2) 78, 79
Section 14 (4) 84
Section 15 . . . . . 72, 73
Section 16 56
Section 17 49
Section 18 49
Section 18, Rule 1 49
Section 18, Rule 2 50
Section 18, Rule 3 53
Section 18, Rule 4 53
Section 18, Rule 5 (1) 56
Section 18, Rule 5 (2) 60
Section 19 (1) 61
Section 19 (2) 61
Section 19 (3) 41, 61, 92
Section 20 . . . . . 48, 65, 101
Section 21 85
Section 22 86
Section 23 15
Section 24 86
Section 25 (1) 91
Section 25 (2) 92, 173
Section 27 . . . . . 113, 119
Section 28 144
Section 29 (1) 103
Section 29 (2) 102
Section 29 (3) 97, 99
Section 29 (4) 101
Section 29 (5) 103
Section 30 . . . . . 103, 105
Section 31 (1) 105
Section 31 (2) 106
Section 32 (1) 109
Section 32 (2) 111
Section 32 (3) 111
Section 33 110
Section 34 113
Section 35 114
Section 36 119
Section 37 143
Section 38 143
Section 39 146
Section 40 147
Section 41 144
Section 42 145
Section 43 148
Section 44 150
Section 45 . . . . . 151, 152, 154, 155, 156

PAGE
Section 46 157
Section 47 . . . . . 145, 149, 157
Section 48 158
Section 49 . . . . . 124, 127, 146
Section 50 . . . . . 125, 146
Section 51 129
Section 52 135
Section 53 138
Section 54 . . . . . 130, 139
Section 55 32
Section 58 . . . . . 166, 167, 169
Section 59 141

SALE OR RETURN—
Is a conditional sale 53
Act adopting the transaction 54
Fraud in transactions of 54
Mere possession of goods gives no title to dispose of them 55

SHIP—
Sale of 42
Contract to build 62

SPECIFIC IMPLEMENT 135

STOPPAGE IN TRANSITU 150
Who may stop 150
Buyer must be insolvent 151
Course of transit, definition of, ... 151
In contracts f.o.b. 153
Insolvent buyer may reject goods 156
How stoppage effected 157

THIEF—
Sale by. 85

TIME—
Stipulations as to 100
"Month" 101
"Days" 101
"As soon as possible" 102

"TO ARRIVE"—
Sale of goods. 39

TRADE NAME—
Sale of goods under 76
Meaning of term 77

TRANSFER OF TITLE—
General rule 85
Sale by a thief 85
Sale in market overt 86

PAGE
Mere possession gives no power to dispose of goods . 86
By a mercantile agent 87
What must be proved to bring case under Factors Act 88
That person was a mercantile agent in sense of the Act 88
That he was in possession of goods with consent of the owner 89
That he was acting in the ordinary course of business of a mercantile agent . . . 89
Pledge by agent does not cover past liability . 90
Mode of pledging 91
By sellers and buyers who have not the property in the goods 91
By other parties entitled at common law or by statute 93

TREES—
Sale of growing 52

UNASCERTAINED GOODS—
No property can pass in sale of 56

"WITH ALL FAULTS"—
Sale, meaning of, ... 20

"WITHOUT RESERVE"—
Sale by auction, meaning of, ... 170